Supreme Court, U.S.
FILED

No. 02-855

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IN THE SUPREME COURT OF THE UNITED STATES

GEORGE M. GALAZA, Warden, et al., *Petitioners,*

v.

JESUS AVILA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy Attorney General
*SHAWN McGAHEY WEBB
Deputy Attorney General
*Counsel of Record
300 South Spring Street
Los Angeles, CA 90013
Telephone: (213) 897-2276
Fax: (213) 897-2263
Counsel for Petitioners

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QUESTIONS PRESENTED

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal court may not grant habeas corpus relief to a state prisoner on a claim adjudicated on its merits in state court unless, *inter alia*, the state court's decision was "contrary to" clearly established federal law as determined by this Court, 28 U.S.C. § 2254(d)(1), or was based upon an "unreasonable" determination of the facts in light of the evidence presented in the state proceeding, § 2254(d)(2). Further, the state court's determination of factual issues "shall be presumed correct" unless rebutted by "clear and convincing evidence." § 2254(e)(1).

The Questions Presented are:

1. May a federal habeas corpus court reject a state court's factual determinations because it has a "firm conviction," after conducting its own review of the state court evidentiary record, that the state court's findings were "wrong?"

2. Did the Ninth Circuit err under *Early v. Packer*, 123 S.Ct. 362 (Nov. 4, 2002), by rejecting the state court's adjudication of the merits of the prisoner's claim as "contrary to" clearly established federal law merely because the state court did not expressly cite or apply federal law in its decision?

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IN THE SUPREME COURT OF THE UNITED STATES

No.

GEORGE M. GALAZA, Warden, et al., *Petitioners,*

v.

JESUS AVILA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

George M. Galaza, Warden of the State Prison at Corcoran, California (the State), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 297 F.3d 911 (9th Cir. 2002). The order of the United States District Court for the Central District of California is unreported. Both are reproduced in the Appendix to this Petition. Additional relevant orders are also reproduced in the Appendix.

STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment granting habeas corpus relief on July 22, 2002. Appendix C. The State's petition for rehearing and suggestion for rehearing en banc was denied on August 30, 2002. Appendix B. The jurisdiction of this Court is timely invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2254(d) of Title 28 of the United States Code provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Section 2254(e)(1) of Title 28 of the United States Code provides:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

The prosecution's evidence at respondent Jesus Avila's criminal trial established that, on the afternoon of August 19, 1990, five Black teenagers left a birthday party in Lynwood, California, and walked to nearby Ham Park to "hang out." Avila and another Hispanic man approached and asked their gang affiliation. The boys explained that they did not know anything about gangs in Lynwood. One of the boys asked Avila where he had gotten his gang tattoos. Avila responded that he would be right back with "the dude who does the tattoos." Avila returned with a group of thirty to forty male Hispanics who angrily confronted the boys about their presence in the park. When a Hispanic male "socked" one of the teenagers, the boys fled across the park. Meanwhile, Avila, who had slipped away during the confrontation, returned with a gun and followed. Avila fired his gun several times and hit one of the boys, Demetrius Kidd, in the back of the head. Police officers arrived within minutes. Kidd and another boy, Romel Johnson, independently identified Avila as the shooter in field show-ups and at trial.

The defense presented evidence of a complete alibi. Avila and three other witnesses testified that he had played no role in the shooting and was elsewhere in the park at the time it occurred.

The jury rejected Avila's alibi defense, convicted him of attempted first-degree murder, and found true the special allegations that he personally used a firearm during the commission of the offense and that he inflicted great bodily injury on his victim. The trial court sentenced Avila to state prison for life with the possibility of parole, plus eight years.

Avila appealed the judgment and concurrently sought state habeas corpus relief alleging, *inter alia*, that trial counsel was constitutionally ineffective for failing to investigate and present additional alibi witnesses and evidence regarding the third party culpability of Avila's brother, Ernesto, who, over two years after trial, claimed responsibility for the shooting. The

California Court of Appeal issued an order referring Avila's habeas matter to the Los Angeles County Superior Court for the taking of evidence and finding of fact. Appendix K. While the habeas case was pending, the California Court of Appeal affirmed Avila's judgment of conviction and sentence on direct appeal. Appendix L.

Thereafter, Judge William Pounders, the appointed superior court referee, held a 10-day evidentiary hearing during which he heard the testimony of 23 witnesses and the argument of counsel. Judge Pounders issued a 19-page referee's report that summarized the evidence and detailed his factual findings, including his credibility determinations of key defense and prosecution witnesses. Appendix J. Specifically, Judge Pounders determined that the new alibi witnesses would have been cumulative to those who gave Avila a complete alibi defense at trial, that the new witnesses who identified Ernesto as the shooter were not credible for reasons such as their relationship with Avila and their remote location in the park at the time of the shooting, and that none of the new witnesses would have been available to testify at trial — including Ernesto who, prior to trial, had claimed he was not even at the park when the shooting occurred. On the other hand, Judge Pounders determined that prosecution witness Romel Johnson, who had positively identified Avila as the shooter at the scene, at trial, and at the reference hearing, was "an exceptionally persuasive witness" whose "compelling testimony . . . was an obstacle [trial counsel] could not overcome." Appendix J at 123-26, 128-30.

The California Court of Appeal, after examining the transcripts of the hearing and considering the referee's report, adopted Judge Pounders' factual and credibility findings and denied Avila's petition. Appendix I. State court proceedings concluded on February 24, 1994, when the California Supreme Court denied Avila's final state petition for habeas corpus relief. Appendix H.

On December 3, 1997, Avila filed a federal habeas corpus petition re-alleging the ineffective assistance of counsel claims

rejected by the state courts. After several rounds of briefing, the magistrate concluded that the state court's rejection of Avila's claims was neither "contrary to, or an unreasonable application of clearly established Federal law" nor "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" and recommended that the petition be denied with prejudice. Appendices F & G. The district judge adopted the magistrate's recommendation and entered judgment against Avila on November 1, 2000. Appendices D & E.

Petitioner appealed to the Ninth Circuit. That court determined that it could reach the merits of Avila's claims and grant relief for two reasons. One, the state referee's report did not cite or apply this Court's precedent and therefore was automatically "contrary to" federal law under § 2254(d)(1). Appendix C at 14. Two, "the referee's factual findings were 'clearly erroneous,' [under § 2254(e)(1)] such that [the Ninth Circuit panel was] left with 'a firm conviction' that the determination made by the state court was wrong and that the one [Avila] urges was correct." Appendix C at 15. In granting relief, the Ninth Circuit reviewed the same state court record but reached conclusions diametrically opposed to those reached by Judge Pounders. The Ninth Circuit panel opined that the defense witnesses were credible and not cumulative and that all of them were available at the time of trial - including Ernesto, who the court inferred would have confessed to the crime at trial if defense counsel had asked. Appendix C at 24-27, 29 & nn. 12-14.

On remand following the Ninth Circuit's denial of the State's petition for rehearing and suggestion for rehearing en banc, the district court entered judgment ordering the State to release Avila unless he is retried by January 6, 2003. Appendix A. No stay is currently in effect.

REASONS FOR GRANTING CERTIORARI

QUESTION 1

THIS CASE PRESENTS AN IMPORTANT QUESTION OVER WHICH THE FEDERAL COURTS ARE IN DISARRAY: THE RELATIONSHIP OF 28 U.S.C. §§ 2254(D)(2) AND (E)(1) AND THE STANDARD BY WHICH A FEDERAL HABEAS COURT MUST REVIEW A STATE COURT'S CREDIBILITY AND FACTUAL FINDINGS

Before Congress overhauled the federal habeas corpus statutes by enacting the AEDPA in 1996, 28 U.S.C. § 2254(d) contained no provision requiring deference to a state court's "reasonable" factual determinations. Rather, former § 2254(d) prescribed a presumption of correctness conditioned by a host of contingencies and exceptions. Appendix M. In stark contrast, current § 2254(d) *precludes* the grant of federal habeas corpus relief to a state prisoner except, *inter alia*, where the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d)(2). And § 2254(e)(1) deleted the contingencies and exceptions of former § 2254(d) and now provides simply that a state court's factual determinations "shall be presumed correct" unless the prisoner carries the heavy burden "of rebutting the presumption of correctness by clear and convincing evidence."

The Ninth Circuit ignored the significant changes wrought by the AEDPA in evaluating the state court's decision in this case. While the Ninth Circuit made glancing references to §§ 2254(d)(2) and (e)(1), it actually applied a standard of review more in keeping with former § 2254(d). Instead of viewing the state court's factual and credibility determinations as

presumptively correct and holding Avila to his burden of rebutting that presumption with clear and convincing evidence as required by § 2254(e)(1), the Ninth Circuit employed a "firm conviction" standard of review — a standard not found in the AEDPA but described as involving a determination that the state court was "wrong" and Avila "correct" — to reject the state court's factual and credibility determinations in favor of conclusions reached as the result of its independent review of the same state court record.[3]

The so-called "firm conviction" standard, as applied by the Ninth Circuit, allows a federal court to grant habeas corpus relief to a state prisoner based on an independent determination that the state court's factual findings were incorrect whether or not the prisoner presented clear and convincing evidence to rebut the presumption of correctness and without regard for whether the state court's factual findings were reasonable in light of the evidence presented to it. It is untethered to the AEDPA and constitutes an impermissible expansion of the power federal courts currently have to grant habeas corpus relief to state prisoners.

Two examples make the point. Terri Clark testified at the evidentiary hearing. She alleged an alibi for Avila and identified his brother, Ernesto, as the shooter. Judge Pounders rejected Clark's testimony as not credible based on her long-term friendship with Avila, her failure to tell the defense investigator that Ernesto was the shooter, and the fact that two witnesses standing near the area where she was standing when she allegedly saw the shooting testified that they could not see the shooting or even tell the direction from which the shots were fired. Three other witnesses, Alice Dominguez, Marcella Riboni, and Angela Espinoza, provided testimony similar to that

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3. The Ninth Circuit apparently borrowed its "firm conviction" standard from *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), in which this Court explained that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

of Clark. Judge Pounders discounted their testimony as well because, like Clark, they could not have seen the shooting from their locations in the park. Appendix J at 118-21, 126-29.

Avila's brother, Ernesto, also testified at the evidentiary hearing. He claimed that he fired a couple of shots at the Black teenagers, but did not see anyone fall as a result. Judge Pounders determined that Ernesto had been unavailable to give his testimony at trial because he had told Avila's trial investigator he was not at the park when the shooting occurred, and because none of the witnesses contacted during the investigation identified Ernesto as the shooter. Judge Pounders further determined that any self-incriminating information to the contrary that Ernesto may have given to his own attorney and defense investigator was confidential and would not have been revealed to Avila's trial counsel if he had inquired. Appendix J at 110-11, 124-25. Two state appellate courts, a federal magistrate judge and a federal district court judge properly deferred to these factual and credibility findings. The Ninth Circuit, however, did not. Rather, upon independent review of the state court record — the record created at the hearing over which Judge Pounders personally presided — the Ninth Circuit determined that Judge Pounders' credibility and factual determinations were "wrong." While purporting "not [to] denigrate the role of the fact-finder in judging credibility when [reviewing] the record in hindsight," the Ninth Circuit rejected Judge Pounders' negative credibility determinations as lacking "factual basis" in the record or having been rebutted by "clear and convincing evidence to the contrary." But the Ninth Circuit did not point to anything other than its own speculative reinterpretation of the record to support these conclusions. Appendix C at 21-23 & nn.12-14.

Perhaps most inexplicably, the Ninth Circuit rejected Judge Pounders' determination that Ernesto was not available to testify at trial. In the Ninth Circuit's view, Ernesto "might have come forward – or at least made an inculpatory statement that could have been used against him at trial" if only he had been asked to do so by Avila's trial counsel. Appendix C at 25; *see*

also Appendix C at 24. There is absolutely no support in the record for this counterintuitive conclusion. Certainly, Ernesto never testified that he would have incriminated himself at trial. To the contrary, the evidence shows that Ernesto knew his brother was being tried for attempted murder, that no witnesses at trial identified him (Ernesto) as the "real" shooter, and that Ernesto nonetheless chose to stick to the story that he was not even in the park when the shooting occurred.

As these examples demonstrate, the Ninth Circuit's application of the so-called "firm conviction" standard of review allowed it to reject Judge Pounders' credibility and factual determinations - and grant Avila relief - simply because it chose to draw different inferences and conclusions from the cold transcripts of the state evidentiary hearing record. The Ninth Circuit panel's decision, and the standard of review from which it derived, is wholly incompatible with the AEDPA.

First, the Ninth Circuit's "firm conviction" standard does not truly effectuate the presumption of correctness or require the prisoner to rebut the presumption with clear and convincing evidence. Although the Ninth Circuit asserted that the state court record contained clear and convincing evidence contrary to several of Judge Pounders' findings, a fair reading of the record demonstrates that the Ninth Circuit made such assertions based on its re-interpretation and re-evaluation of ambiguous or conflicting testimony. But testimony that is ambiguous or conflicting does not constitute clear and convincing evidence sufficient to rebut the presumption of correctness. *Seymour v. Walker*, 224 F.3d 542, 551-52 (6th Cir. 2000). As this Court explained long ago, evidence is clear and convincing only if it "does not leave the issue in doubt." *Schneiderman v. United States*, 320 U.S. 118, 141 (1943). The Ninth Circuit's mere assertion that clear and convincing evidence rebutted Judge Pounders' credibility and factual findings does not satisfy this "heavy burden." *Id.; and see Sawyer v. Whitley*, 505 U.S. 333, 349 (1992) ("latter-day evidence brought forward to impeach a prosecution witness will seldom, if ever make clear and convincing showing" necessary to establish innocence of death

penalty).

The immutability of this conclusion is all the more apparent when the "special deference" owed to a state court's credibility findings is considered. As was well-established under pre-AEDPA law, "federal habeas courts [had] no license to redetermine the credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983). Rather, federal habeas courts owed a "special deference" to a state court's credibility findings. *Patton v. Young*, 467 U.S. 1025, 1038 (1984). The AEDPA did not vitiate this rule of law. It strengthened the rule by making it more difficult for a federal habeas court to jettison a state court's credibility findings. *See, e.g., Sanna v. DiPaolo*, 265 F.3d 1, 10 (1st Cir. 2001).

Second, the Ninth Circuit's "firm conviction" standard does not require an inquiry into the reasonableness of the state court's factual determinations. Instead, application of the "firm conviction" standard allowed the Ninth Circuit to skirt the reasonableness inquiry and grant relief based solely on its independent determination that the state court's factual determinations were wrong. However, as this Court has explained in conjunction with the reasonableness provision of § 2254(d)(1), a "wrong" decision is not the same as an "objectively unreasonable" one. *Williams v. Taylor*, 529 U.S. 362, 410-13 (2000); *Bell v. Cone*, 122 S.Ct. 1843, 1850 (2002). "Under § 2254(d)(1)'s 'unreasonable application' clause . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams v. Taylor*, 529 U.S. at 411. It logically follows that the same distinction between "wrong" and "objectively unreasonable" must be made vis-a-vis § 2254(d)(2)'s "reasonable determination of the facts" clause. A federal habeas court may not issue the writ simply because it concludes in its independent judgment that the relevant state court decision was based on factual determinations that are

wrong – the state court's decision must also be *objectively unreasonable*. The Ninth Circuit's "firm conviction" standard ignores this distinction and eviscerates the reasonableness inquiry by allowing a grant of relief to rest solely on a determination that the state court's factual determination was wrong.[4]

As the foregoing examples demonstrate, and as the Ninth Circuit has candidly acknowledged, "the relationship between § 2254(d)(2) and § 2254(e)(1) is not entirely clear." *Green v. White*, 232 F.3d 671, 672 n.3 (9th Cir. 2000). There is no consensus among the other federal circuits regarding the relationship between these provisions or the standard by which a federal court must review a state court's factual determinations. While it is generally acknowledged that the AEDPA requires increased deference to a state court's factual findings, *Carter v. Lee*, 283 F.3d 240, 251 (4th Cir. 2002) (referring to the "deferential standard of review established by AEDPA and embodied in § 2254(e)(1)"); *Fugate v. Head*, 261 F.3d 1206, 1215 (11th Cir. 2001) ("§ 2254(e)(1) provides for a highly deferential standard of review for factual determinations made by a state court"); *Werts v. Vaughn*, 228 F.3d 178, 196 (3d Cir. 2000) ("AEDPA increases the deference federal courts must give to the factual findings . . . of the state courts"), the exact nature of the relationship between §§ 2254(d)(2) and (e)(1) has proved elusive, *Valdez v. Cockrell*, 274 F.3d 941, 951 n.17 (5th Cir. 2001) (harmonizing §§ 2254(d)(2) and (e)(1) as separate aspects of new factual deference inquiry); *id.* at 965-68 (Dennis, J., dissenting) (interpreting §§ 2254(d)(2) and (e)(1) to yield a result similar to pre-AEDPA law); 17A Wright et al. FEDERAL PRACTICE AND PROCEDURE, § 4265.2 (Supp. 2001) ("It is not clear how this invitation to decide whether the state

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4. A closely related issue is currently pending before this Court in *Lockyer v. Andrade*, case number 01-1127, *i.e.*, whether a federal habeas court may first address the correctness of a state court's legal determination before considering whether it was contrary to, or involved an unreasonable application of, clearly established federal law.

fact determinations were reasonable will fit with the presumption that the state fact determinations are correct"), and has thus far precluded articulation of a standard of review that embodies the heightened deference contemplated by the AEDPA, *Green v. White,* 232 F.3d at 672 n.3 (unclear relationship of §§ 2254(d)(2) and (e)(1) need not be defined because "standard of review appears to be clear error under both statutory provisions"). In fact, notwithstanding that heightened deference, some circuits appear entirely ready to interpret §§ 2254(d)(2) and (e)(1) pursuant to pre-AEDPA standards such as those found in former §§ 2254(d)(6) and (d)(8). *Scarbrough v. Johnson*, 300 F.3d 302, 305 (3d Cir. 2002) ("a federal court must presume that state court findings of fact are correct, unless they are not fairly supported by the record"); *Simmons v. Luebbers,* 299 F.3d 929, 942 (8th Cir. 2002) ("'the factual findings of state courts are presumed to be correct, and may be set aside . . . only if they are "not fairly supported by the record"'"); *Yung v. Parker,* 296 F.3d 129, 137 (2d Cir. 2002) (referring to the focus of § 2254(d)(2) as "whether the court's factual findings are supported by sufficient evidence"); *Valdez v. Cockrell*, 274 F.3d at 965-68 (Dennis, J., dissenting) (reading §§ 2254(d)(2) and (e)(1) *in pari materia* yields results similar to those reached by former § 2254(d)(6)).

The Ninth Circuit's application of the so-called "firm conviction" standard of review in this case and the general confusion among the federal circuits regarding the relationship between §§ 2254(d)(2) and (e)(1) raise an important question of federal law: By what standard must a federal habeas court review a state court's credibility and factual determinations? Sections 2254(d)(2) and (e)(1) are the means by which Congress attempted to protect the reasonable factual determinations of the state courts. Unless the heightened factual deference contemplated by these provisions is acknowledged and effectuated, standards of review untethered to the AEDPA will proliferate and impermissibly expand the power of the federal courts to grant habeas corpus relief to state prisoners.

QUESTION 2

THE NINTH CIRCUIT'S DETERMINATION THAT THE STATE COURT'S DECISION WAS "CONTRARY TO" CLEARLY ESTABLISHED FEDERAL LAW BECAUSE IT DID NOT CITE OR APPLY THIS COURT'S PRECEDENT IS INSUPPORTABLE GIVEN *EARLY v. PACKER*

The Ninth Circuit designated the referee's report as the operative state court decision in this case and then found it "contrary to" federal law because it "did not cite any law, much less controlling Supreme Court precedent." Appendix C at 14. The validity of this holding was highly suspect at the time it issued given its lack of support in the plain language of the statute and its inconsistency with the majority of the federal courts of appeals. Any question of its complete invalidity has since been put to rest. As the Court explained in *Early v. Packer*, 123 S.Ct. 362, 365 (Nov. 4, 2002), the Ninth Circuit's interpretation of the "contrary to" clause is wrong. Accordingly, just as in *Packer*, the Ninth Circuit's error in this case should be reversed.

CONCLUSION

For all of these reasons, the State respectfully asks the Court to grant the petition for writ of certiorari.

Dated: November 25, 2002

Respectfully submitted,

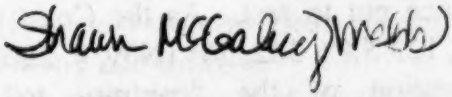
BILL LOCKYER
Attorney General of the State of California

MANUEL M. MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

DONALD E. DE NICOLA
Deputy Attorney General



*SHAWN McGAHEY WEBB
Deputy Attorney General
*Counsel of Record

Counsel for Petitioners

(2)

No.

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JESUS AVILA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
VOLUME 1 OF 1

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy Attorney General
*SHAWN McGAHEY WEBB
Deputy Attorney General
*Counsel of Record
300 South Spring Street
Los Angeles, CA 90013
Telephone: (213) 897-2276
Fax: (213) 897-2263
Counsel for Petitioners

APP

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APPENDIX A

APPENDIX V

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESUS AVILA,
Petitioner
v.
GEORGE GALAZA, Warden,
Respondents.

Civil No. SACV 98-0336-AHS (Mc)

JUDGMENT [AFTER REMAND]

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)

Pursuant to the mandate of the United States Court of Appeal for the Ninth Circuit in Avila v. Galaza, 297 F.3d 911 (9th Cir. 2002),

The petition for writ of habeas corpus is granted and the petitioner is ordered released from the respondent's custody unless the State of California retries the petitioner within 90 days of the entry of judgment herein.

Dated: October 7, 2002

/S/
ALICEMARIE H. STOTLER
United States District Judge

APPENDIX B

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
AUG 30 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JESUS AVILA,	No. 01-55149
Petitioner-Appellant,	D.C. No. CV-98-00336-AHS
GEORGE GALAZA, Warden; ATTORNEY GENERAL of the State of California,	ORDER
Respondents-Appellees.	

Before: PREGERSON, FISHER, and TALLMAN, Circuit Judges.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing and reject the suggestion for rehearing en banc.

The suggestion for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESUS AVILA, Petitioner-Appellant, GEORGE M. GALAZA, Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA Respondents-Appellees.	No. 01-55149 D.C. No. CV 98-00336-AHS OPINION

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

Argued and Submitted
March 5, 2002 – Pasadena, California

Filed July 22, 2002

Before: Harry Pregerson, Raymond C. Fisher, and Richard C. Tallman, Circuit Judges

Opinion by Judge Pregerson

SUMMARY

Criminal Law and Procedure/Right to Counsel

The court of appeals reversed a judgment of the district court. The court held that trial counsel provides ineffective assistance of counsel when, despite his belief that another

person was guilty of the crime alleged against his client, he fails to investigate or introduce at trial evidence that the other person was guilty.

Appellant Jesus Avila, his brother Ernesto, and 30 or 40 other men and women attended a baby shower at a park in Lynwood, California. Jesus and Ernesto, and several of the male attendees at the baby shower, were associated with a gang. That afternoon, a group of men, including Demetrius Kidd and Romel Johnson, entered the park and walked past the baby shower. A fight ensued, and Kidd and Johnson ran from the park; Kidd was shot behind his left ear. Jesus was convicted of attempted murder in California state court. At his trial, Jesus had testified that he was not involved in the shooting. The witnesses corroborated Jesus's testimony.

Jesus had been initially represented by George Denny, who was representing Jesus's brother, Ernesto, in another matter at the time. Shortly after Jesus was arrested, at least three people told Denny's investigator, David Lynn, that it was Ernesto not Jesus, who shot Kidd. Shortly after the shooting, Ernesto met with Denny and Lynn and confessed that he, not Jesus, was the shooter. Denny withdrew from Jesus's case because he believed that Ernesto's confession created a conflict of interest. Ted Yamamoto was appointed by the court to represent Jesus. Denny indicated to Yamamoto that he recused him from Jesus's case because he was representing someone that might have been the shooter. Yamamoto did not seek any information from Denny about the identity of the shooter.

Before trial, Yamamoto became convinced that Ernesto was the shooter. Yamamoto was so confident that Ernesto was the shooter that he told the prosecution that Ernesto was probably the shooter during plea negotiations. However, Yamamoto conducted no investigation to substantiate this belief and never instructed his investigator to seek out evidence implicating Ernesto. After Jesus was convicted, Yamamoto

filed a motion for a new trial that included declarations from two witnesses, one of whom saw Ernesto shoot Kidd. The request for a new trial was denied. Jesus's conviction was affirmed by the California Court of Appeal.

At Jesus's state habeas hearing, Ernesto took the stand and admitted that he, not Jesus, was the shooter. Several witnesses corroborated Ernesto's testimony. Yamamoto testified that he was incompetent because he did not investigate Ernesto's involvement in the shooting despite his belief that Ernesto was the shooter. The California Court of Appeal denied Jesus's petition, concluding that Yamamoto provided competent representation and adequately investigated Jesus's case. The California Supreme Court denied Jesus's petition for review. Jesus's habeas corpus petition in federal district court was denied.

Jesus appealed.

[1] To show ineffective assistance of counsel, Jesus had to first show deficient performance: that counsel's representation fell below an objective standard of reasonableness. Second, Jesus had to show prejudice: that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

[2] Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. [3] A lawyer who fails adequately to investigate, and to introduce into evidence, evidence that demonstrates his client's factual innocence, or that raises sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance.

[4] Yamamoto's performance was deficient because he failed to investigate or introduce at trial evidence that Ernesto was the shooter. There was clear and convincing evidence that

it was Yamamoto's inadequate pre-trial investigation that kept this evidence out of the courtroom at Jesus's trial. [5] In light of Yamamoto's belief that Ernesto was the shooter, his failure to investigate or introduce at trial any evidence of Ernesto's involvement in the shooting constituted deficient performance. [6] Considering the totality of the evidence introduced at trial and at the state habeas hearing, it had to be concluded that Yamamoto's deficient performance prejudiced Jesus because there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The district court's order denying Jesus's petition for a writ of habeas corpus had to be reversed.

COUNSEL

Nancy S. Coan, Kaufmann & Logan, San Francisco, California, for the appellant.

Juliet H. Swoboda, Deputy Attorney General, Los Angeles, California, for the appellees.

OPINION

PREGERSON, Circuit Judge:

Jesus Avila ("Jesus") appeals the district court's denial of his federal habeas corpus petition. Jesus was convicted in the Superior Court of Los Angeles County, California, of attempted murder with the use of a firearm and sentence to life plus eight years. Jesus asserts, among other claims in his state and federal habeas petitions, that he received ineffective assistance of trial counsel because his attorney failed to investigate or introduce at trial any evidence that Jesus's brother, Ernesto Avila ("Ernesto"), was the shooter. Following and evidentiary hearing in state court ("state habeas hearing"), Jesus's state

habeas petition was denied. The district court adopted a magistrate judge's recommendation to deny Jesus's federal habeas petition. We hold that Jesus's trial counsel provided ineffective assistance of counsel because he failed to investigate and introduce evidence that would have raised a reasonable doubt about Jesus's guilt, and therefore reverse and remand this case to the district court with directions to issue the writ of habeas corpus unless California retries the defendant within 90 days.[1]

I.

A. Facts

On August 19, 1990, Jesus, Ernesto, and thirty or forty other men and women attended a baby shower at Ham Park, which covers two square blocks in Lynwood, California. The partygoers congregated around a barbecue area and picnic tables in the northwest section of the park. Jesus and Ernesto, and several of the male attendees at the baby shower, were associated with the Young Crowd gang.

That afternoon, a group of black men, including Demetrius Kidd (("Kidd") and Romel Johnson ("Johnson"), entered the park and walked past the baby shower. Jesus and a male companion[2] approached the black men and had a friendly conversation. The black men admired the tattoos on Jesus and his companion, and both Jesus and his companion lifted their tank tops to display large tattoos on their backs. Jesus then offered to go get the person who did the tattoos. What happened next was disputed at trial.

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1. We review a district court's decision to deny a petition for writ of habeas corpus de novo. *See Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999).

2. Ernesto testified at the state habeas hearing that he was the person who accompanied Jesus.

Kidd and Johnson testified for the prosecution that Jesus returned five or ten minutes later with a large group of men and women. The men told Kidd and his friends to leave the park, and the started kicking and punching them. Kidd and Johnson both testified that they saw Jesus move away from the crowd as the fighting began and stand near a group of women. Johnson testified that, as he was fighting with members of the Young Crowd gang, he observed Jesus get what looked like a gun from a crack in the wall running along the western edge of the park, near where the women were standing. Kidd and Johnson and one or two of their friends then began running away from the fight, toward center field of a baseball field in the southern half of the park. Kidd and Johnson testified that they looked back to see Jesus running toward them. Kidd then saw Jesus shoot a gun at them. The men continued running through the baseball field and toward Wright Road, which borders the eastern edge of the park. Kidd was shot behind his left ear when he was running across the street.

Jesus testified, in his own defense, that he was near the barbecue area of the park with his girlfriend, Joanna Espinoza ("Joanna"), when the shooting occurred. Jesus testified – consistent with Kidd's and Johnson's testimony – that he had a friendly conversation with a group of black men about his tattoos, and offered to get the person who did his tattoos. Jesus testified that the men declined Jesus's offer and Jesus returned to the baby shower to get some food. Soon thereafter, Jesus saw the black men spray painting gang signs on the wall at the western edge of the park and then saw a fight break out between a group of Young Crowd gang members and the black men. Jesus testified that he attempted, unsuccessfully, to break up the fight, and then walked toward Joanna, who was near the barbecue area. When Jesus heard shots, he dove to the ground with Joanna and Elizabeth Luis ("Elizabeth"), for whom the baby shower was held.

Three witnesses corroborated Jesus's testimony at trial.

Elizabeth testified that she was with Jesus and Joanna when the shooting started and that the three of them dove to the ground. Blanca Montoya ("Blanca") – Ernesto's girlfriend and another attendee of the baby shower – testified that she saw Jesus, Joanna, and Elizabeth getting up from the ground immediately after the shooting occurred. Alfredo Sanchez ("Alfredo") – who did not know Jesus and was not at the baby shower but recognized Jesus from the neighborhood – testified that he was in a house near the park when he heard shooting. When Alfredo looked outside the house, he saw Jesus covering two women on the ground.

B. Jesus's Representation

Jesus was initially represented by George Denny ("Denny"), who was representing Jesus's brother, Ernesto, in another matter at the time. Shortly after Jesus was arrested, at least three people told Denny's investigator, David Lynn ("Lynn"), that it was Ernesto, not Jesus, who shot Kidd.[3/] Shortly after the shooting, Ernesto met with Denny and Lynn and confessed that he, not Jesus, was the shooter. Attorney Denny withdrew from Jesus's case because he believe that Ernesto's confession created a conflict of interest.

Attorney Ted Yamamoto ("Yamamoto") was in the courtroom when Denny recused himself and was appointed by the court to represent Jesus, Denny "indicated" to Yamamoto that he recused himself from Jesus's case because he was "representing someone that . . . might have been the shooter." At the state habeas hearing, Yamamoto explained that, based on

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3. Two of these witnesses, Angela Espinoza and Marcella Riboni, testified at the state habeas hearing that they told Lynn that they saw Ernesto shoot Kidd. A third witness, Joanna Espinoza, testified at the state habeas hearing that she told Lynn that Ernesto had admitted to her that he was the shooter.

this conversation, he thought that Denny "knew or had some idea who the real shooter was," and "thought possibly the investigation might start with discovering that person's identity." Denny did not provide Yamamoto with information about the witnesses who had spoken to Denny's investigator, Lynn, and Yamamoto did not seek any information from Denny about the identity of the shooter.

Before trial, Yamamoto became convinced that Ernesto was the shooter. Although Yamamoto testified at the state habeas hearing that a "series of events" before trial caused him to conclude that Ernesto was the shooter, one conversation in particular solidified this conclusion. After a pretrial conference, Yamamoto told Ernesto's and Jesus's mother, Christina Avila ("Christina"), that he believed Jesus was innocent and asked Christina to "ask around the neighborhood or find out who is the shooter [because] . . . it would give us somewhere to go." Yamamoto testified that Christina "looked somewhat dejected and looked back up at [Yamamoto] very distraught, and she said, 'I think I know, but *it would be trading one for the other.*'" (Emphasis added). Yamamoto was so confident that Ernesto was the shooter that he told the prosecution that Ernesto was probably the shooter during plea negotiations.

Despite Yamamoto's belief that Ernesto was the shooter, he conducted no investigation to substantiate this belief and never instructed his investigator, Kazuo Sakamoto ("Sakamoto"), to seek out evidence implicating Ernesto. During the state habeas hearing, Yamamoto explained that he did not investigate Ernesto's involvement in the shooting because he assumed that Jesus and Christina, Jesus's mother, did not want him to implicate Ernesto at trial. As Yamamoto testified:

> I was pretty sure at some point during that trial or prior to the trial that Ernesto was the real shooter. *In my omission to act, that is*

> *to do something about it, I think I was – can be categorized as being incompetent. . . . .* [Jesus] *never actually expressed to me a desire for me to restrain myself from going after Ernesto, but at the same time I assumed that that's what he wanted.* I also assumed that his mother didn't want me to, because I can still see her face when she told me that I'd be trading one for the other, and because of that fact alone, *I think again in retrospect, maybe I should have asked to be relieved.*

(Emphasis added). Yamamoto also explained that he did not "aggressively" investigate whether Ernesto was the shooter because he "entertained a strong belief" that Ernesto was going to admit that he was the shooter before or during trial. Yamamoto testified:

> As the trial went on, I would always turn around when someone came in the courtroom thinking that Ernesto was going to say stop this whole, you know, thing, and/or I was going to get a phone call during the course of the trial one evening. . . . That was in the back of my mind. Not that I planned for something like that to happen. . . . [But] I believed it would.

C. Post-Trial

After a jury convicted Jesus of attempted murder, Yamamoto filed a motion for a new trial because "[he] felt that [he] had made a mistake by not going after Ernesto. . . given the results of the verdict." In the motion, Yamamoto included declarations from two witnesses, one of whom saw Ernesto

shoot Kidd.[4/] The request for a new trial was denied. Jesus's conviction was affirmed by the California Court of Appeal on April 7, 1993.

Jesus filed a state habeas petition, and was granted an evidentiary hearing before a referee in June 1993. Ernest took the stand at the state habeas hearing. The statute of limitations for the attempted murder of Kidd had not run when Ernesto testified, and Ernesto was not given any kind of immunity or promises of leniency in exchange for his testimony. Nevertheless, Ernesto admitted that he, not Jesus, was the shooter. Ernesto testified that he was the person with Jesus when Jesus approached the black men and had a friendly conversation. Ernesto testified that after the fight broke out between several Young Crowd gang members and the black men, he chased the men through the baseball field and shot at them two or three time when he was standing in center field.

Several witnesses corroborated Ernesto's testimony. Four witnesses who attended the baby shower testified that they saw Ernesto chase after the black men and shoot at them from the baseball field's outfield. These four witness, and four additional witnesses who attended the baby shower, testified that they saw Jesus near the barbecue area of the park when the shooting occurred. In addition, Denny (Jesus's first lawyer) and Lynn (Denny's investigator) testified that Ernesto confessed to them that he was the shooter about a week after Jesus was arrested. Yamamoto testified that he was "incompetent" because he did not investigate Ernesto's involvement in the shooting despite his belief that Ernesto was the shooter.

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4. The declarations were by Alice Dominguez and Rosa Luis, both of whom testified at the state habeas hearing. Alice Dominguez testified that she saw Ernesto shoot Kidd and immediately told her friend, Rosa, what she saw. Rosa Luis corroborated Alice Dominguez's testimony at the state habeas hearing.

Following the state habeas hearing, the referee concluded that Yamamoto provided competent representation and adequately investigate Jesus's case. The California Court of Appeal summarily adopted the referee's report and denied Jesus's petition. The California Supreme Court denied Jesus's petition for review. Jesus then filed habeas corpus petition in federal district court. A magistrate judge recommended that Jesus's petition be denied. The district court adopted the magistrate judge's recommendation.

In his timely appeal of the district court's denial of his habeas petition, Jesus argues, among other claims,[5] that Yamamoto provided ineffective assistance of counsel because he failed to investigate whether Ernesto was the shooter, and failed to argue that Ernesto was the shooter at trial.

II.

Because Jesus's habeas petition was filed after April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), we cannot grant his petition unless the state court's adjudication of his claims

> (1) resulted in decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on

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5. Jesus makes three other ineffective assistance of counsel claims in his appeal of the district court's denial of his habeas petition. Because we conclude that Yamamoto provided ineffective assistance of counsel by failing to investigate and argue that Ernesto was the shooter, we do not reach the merits of his other claims.

> an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A state court decision is "contrary to" federal law if it "failed to apply the correct controlling authority from the Supreme Court." *Shackleford v. Hubbard*, 234 F.3d 1072, 1077 (9th Cir. 2000), *cert. denied*, 122 S.Ct. 324 (2001); *see also Williams v. Taylor*, 529 U.S. 362, 405-07 (2000). In determining whether a state court decision is contrary to federal law, we look to the state's last reasoned decision – in this case, the referee's report[6] – as the basis for its judgment. *See Ylst v. Nunnemaker*, 501, U.S. 797, 803-04 (1991); *Shackleford*, 234 F.3d at 1079 n.2.

[1] The Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), is controlling Supreme Court authority that governs Jesus's ineffective assistance of counsel claim. To show ineffective assistance of counsel under *Strickland*, Jesus must first show deficient performance: "that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 668. Second, Jesus must show prejudice: "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Because the referee did not cite any law, much less controlling Supreme Court precedent, and did not apply either prong of *Strickland's* two-factor test in his analysis of Yamamoto's performance, his decision was contrary to federal law. *See Powell v. Galaza*, 282 F.3d 1089, 1095 (9th Cir. 2002); *Shackleford*, 234 F.3d at 1077. Accordingly, we may grant Jesus's petition if we find

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6. The referee's report is the last reasoned decision of the state courts because the California Supreme Court denied Jesus's petition for review without comment, and the California Court of Appeal summarily adopted the referee's findings.

that Yamamoto's performance violated *Strickland*.[7]

In the alternative, we could grant Jesus's petition if the state court's adjudication of his claims "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). In order to grant Jesus's habeas petition Section 2254(d)(2), we must find that the referee's factual findings were "clearly erroneous," such that "we are left with 'a firm conviction' tnat the determination made by the state court was wrong and that the one [Jesus] urges was correct." *Torres v. Prunty*, 223 F.3d 1103, 1108 (9th Cir. 2000) (quoting *Van Tran v. Lindsey*, 212 F.3d 1143, 1153-54 (9th Cir. 2000)). Because we also find that several of the referee's factual findings are clearly erroneous, we may grant Jesus's petition on this ground, as well.

A. Deficient Performance

[2] It is well established that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Although "[j]udicial scrutiny of counsel's performance must be highly deferential," *id.* at 689, "we have found counsel to be ineffective where he neither conducted a reasonable investigation nor made a showing of strategic reasons for failing to do so," *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994).

[3] We have repeatedly found that "[a] lawyer who fails

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7. We need not conduct a harmless error review of *Strickland* violations under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), because "[t]he *Strickland* prejudice analysis is complete in itself; there is no place for an additional harmless-error review." *Jackson v. Calderon*, 211 F.3d 1148, 1154 n.2 (9th Cir. 2000), *cert. denied.*, 531 U.S. 1072 (2001).

adequately to investigate, and to introduce into evidence, [evidence] that demonstrate[s] his client's factual innocence, or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict, renders deficient performance." *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999) (finding defense counsel's performance deficient because he failed to review or introduce at trial documents corroborating defense witness's testimony); *see also Lord v. Wood*, 184 F.3d 1083, 1096 (9th Cir. 1999) (finding defense counsel's performance deficient because he failed to interview or call at trial three witnesses who had told police and investigators that they saw the victim alive a day after the defendant allegedly killer her); *Sanders*, 21 F.3d at 1457 (finding defense counsel's performance deficient because he failed to investigate or introduce at trial evidence implicating his client's brother).

[4] We find that Yamamoto's performance was deficient because he failed to investigate or introduce at trial evidence that Ernesto was the shooter. The referee found that the "consistent lack of cooperation from immediate witnesses" prevented Yamamoto from discovering and presenting at trial evidence that Ernesto was the shooter. There is, however, clear and convincing evidence that it was Yamamoto's inadequate pre-trial investigation, not witnesses' lack of cooperation, that kept this evidence out of the courtroom at Jesus's trial.

Yamamoto never told Sakamoto that he believed Ernesto was the shooter and never instructed Sakamoto to seek out evidence implicating Ernesto. Accordingly, Sakamoto never conducted this critical investigation. In fact, the referee found that "hardly anything was done" by Sakamoto before Jesus's trial. Sakamoto interviewed only two people before trial: Joanna Espinoza (Jesus's girlfriend) and Blanca Montoya (Ernesto's girlfriend). The remainder of the hours Sakamoto billed as pre-trial investigation were spent interviewing Jesus, reviewing files, driving to the scene of the crime, and attending

"attorney conferences."[8/] Sakamoto did not speak to Elizabeth Luis or Alfredo Sanchez – two of the witnesses who testified for the defense – until over two weeks after trial began.

Yamamoto conducted to investigation himself and introduced at trial no evidence to support his belief that Ernesto was the shooter. Yamamoto never attempted to contact Ernesto.[9/] Yamamoto never questioned Jesus's mother, Christina – who so much as said that Ernesto was the shooter – to find out what she knew. Yamamoto never attempted to gather any information from Denny, Jesus's first lawyer, despite Denny's suggestion that he knew the identity of the shooter. Yamamoto never attempted to interview Kidd, Johnson, or any of their friends to find out what they saw.

In addition, Yamamoto failed to take advantage of several opportunities to identify and interview potential eye witnesses to the shooting. At trial, two Yamamoto's witnesses, Blanca Montoya and Elizabeth Luis, named several individuals who were at the baby shower – including five of the witnesses who testified at the State habeas hearing. Yamamoto made no attempt to identify or interview any of the people Blanca and Elizabeth named, and has offered no explanation for his failure to find out what these people knew.

Before trial, Yamamoto was given photographs of people that were taken at the baby shower, but did not attempt to identify any of the potential witnesses in the photographs.

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8. The referee found that Sakamoto had perpetrated a "fraud on the court" through his excessive billing.

9. Over two weeks after trial began, Sakamoto did not speak to Ernesto. Sakamoto did not attempt to elicit inculpatory statements from Ernesto during that conversation, presumably because Sakamoto had no reason to suspect that Ernesto was the shooter.

Yamamoto never even gave Sakamoto these photographs to use as investigative tools. During the state habeas hearing, Yamamoto explained that he failed to identify these potential witnesses because he thought that some of the people might not make the "best appearance" before the jury, and because his investigator, Sakamoto, told him – without providing any details or written reports – that some witnesses had been uncooperative. That witnesses *might* not cooperate or make the "best appearance" at trial are unreasonable bases not to identify or attempt to interview them, however. "A lawyer has a duty to investigate what information . . . potential eye witnesses possess [], even if he later decide[s] no to them on the stand." *Sanders*, 21 F.3d at 1457 (citation omitted) (brackets in original).

Even when a witness told Yamamoto that she saw who shot Kidd, Yamamoto failed to interview her or call her as a witness at trial. Terri Clark, who attended and helped organize the baby shower, spoke to Yamamoto at the court house. Yamamoto asked Clark if she had "seen the shooter," and Clark said "yes," but Yamamoto did not ask her the follow-up question that would be on the tip of any reasonable attorney's tongue: "who was the shooter?" Yamamoto subpoenaed Clark to return to court, but never completed his interview and never called her to testify.[10/] Yamamoto's failure to fully interview Terry Clark, after she said she knew the identity of the actual shooter cannot be justified as a reasonable trial strategy. *See Lord*, 184 F.3d at 1094 (failure to interview witnesses who could have demonstrated defendant's factual innocence constitutes deficient performance); *Sanders*, 21 F.3d at 1456 (an attorney's "refusal even to listen to critical information from a key exculpatory witness regarding the basis of his client's most

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10. This is consistent with Yamamoto's testimony at the state habeas hearing that a witness he interviewed "either told [him] or made a strong inference that [the shooter] was Ernesto." Yamamoto did not record this person's name or call her as a witness at trial.

important defense cannot be deemed a permissible strategy").

The reference concluded that it was a "valid tactic" to rely on Alfredo Sanchez's testimony at trial rather than the testimony of "gang members" because Alfredo was an "independent" witness who did not know Jesus and was not associated with the Young Crowd gang.[11/] Yamamoto's decision to rely on Alfredo Sanchez's testimony at trial cannot, however, justify Yamamoto's failure to conduct an adequate investigation – particularly since neither Yamamoto nor Sakamoto spoke to Alfredo until over two weeks after trial began. "[C]ounsel can hardly be said to have made a strategic choice when s/he has not yet obtained the facts on which a decision could be made." *Sanders*, 21 F.3d at 1457.

Moreover, had Yamamoto conducted a reasonable investigation, he would have learned that many of the attendees of the baby shower were not gang members. Several witnesses at state habeas hearing who testified that Ernesto was the shooter and Jesus was in the barbecue area at the time of the shooting were not members of, or otherwise associated with, the Young Crowd gang.

Despite the fact that Jesus never directed Yamamoto to avoid investigating Ernesto's involvement in the shooting, Yamamoto testified that he did not investigate or introduce at trial evidence of Ernesto's guilt because he perceived that it would be "going against the wishes of [Jesus] and his family." This is a patently unreasonable basis not to investigate Ernesto's involvement in the shooting. In *Sanders*, a case that bears striking resemblance to the case, we found that Sander's trial counsel's performance was deficient because he had reason to believe that Sander's brother was guilty of the murder Sanders

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11. Alfredo testified at trial that he was in a house near the park when he heard shooting. When he looked outside, Alfredo saw Jesus covering two women.

was convicted of committing but did not investigate or introduce at trial evidence of Sander's brother's guilt. 21F.3d at 1457. Sander's attorney explained that he did not conduct this investigation because he "'didn't see any reason to get [the borther] involved' and felt he was 'representing the family.'" *Id.* at 1455. We held that, "regardless of any sense of obligation by [counsel] to [his client's brother] and/or to [his client's family] . . . [counsel] had no choice but to respect and perform his duty to [his client]." *Id.* at 1455.

[5] In this case, as in *Sanders*, counsel "failed to fulfill his duty to investigate [his client's] most important defense: that [his client's brother] was the shooter." *Id.* at 1457. In light of Yamamoto's belief that Ernesto was the shooter, his failure to investigate or introduce at trial any evidence of Ernesto's involvement in the shooting constitutes deficient performance.

B. Prejudice

Having established that Yamamoto's performance was deficient, Jesus must also show that he was prejudice by Yamamoto's deficient performance: that "there is a reasonable probability that, absent [Yamamoto's] errors, the factfinder would have had a reasonable doubt respecting [his] guilt." *Strickland*, 466 U.S. at 695. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *Id.* at 694.

Because the California state courts never analyzed whether there was a "reasonable probability that, absent [Yamamoto's] errors, the factfinder would have had a reasonable doubt respecting [his] guilt," *id.*, we have conducted "an independent review of record," *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000). AEDPA requires us to presume that the referee's factual findings are correct; Jesus can only rebut that presumption of correctness with "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

The superior court judge who served as a referee at the state habeas hearing found not credible the testimony of various witnesses. We do not denigrate the role of the fact-finder in judging credibility when we review the record in hindsight. But as we set forth herein, our review of the record leaves us with a definite and firm conviction that error cognizable under *Strickland's* prejudice prong in fact occurred. Having reviewed the transcripts and exhibits from the trial and state habeas hearing, we conclude that Yamamoto's failure to investigate and present evidence that Ernesto was the shooter prejudiced Jesus because there is a reasonable probability that the outcome of the trial would have been different and Yamamoto conducted a reasonable investigation and introduced the fruits of what investigation at trial.

1. Testimony that Ernesto was the shooter

Four witnesses who were not called as witnesses at Jesus's trial testified at the state habeas hearing that they saw Ernesto shoot Kidd and his friends.

Terri Clark testified that she witnessed a fight break out between the black men and members of the Young Crowd gang. During the fight, Clark testified that she walked from the barbecue area "towards the fight a little," and was "close" to the fight as it was occurring. Clark then saw the black men begin to run away from the fight, and saw Ernesto running after them. Clark, testified that the black men ran through a baseball diamond in the park, and Ernesto chased after the men and shot at them four or five time.[12/]

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12. The referee concluded that Terri Clark's testimony was not credible because she could not have observed the shooting "from the barbecue" area. However, the record reflect clear and convincing evidence to the contrary: Clark was "close" to the fight – not in the barbecue area – when she saw Ernesto shoot at the men. There is no basis in the record to

Alice Dominguez, another attendee of the baby shower, was not associated with the Young Crowd gang. Dominguez had previously met Jesus a few times, but had never met Ernesto before the day of the shooting. At the State habeas hearing, Dominguez testified that she saw several black men spray painting a wall in the park and then saw a fight break out between the black men and several members of the Young Crowd gang. Dominguez estimated that she was twenty-five feet away from the fight. Dominguez then saw Ernesto "get up," chase the black guys across the baseball field, and shoot at them about three times. Dominguez testified that she saw one man fall down and then get up and continue running. Immediately after the shooting, Dominguez told her friend, Rosa Luis, that Ernesto was the shooter.[13] Rosa Luis testified at the state habeas hearing that Dominguez did, indeed, identify Ernesto as the shooter.

Marcella Riboni, another attendee of the baby shower, is Jesus's and Ernesto's cousin. Angela Espinoza is Joanna Espinoza's sister. Both women testified at the state habeas hearing that they were standing on top of a picnic bench in the

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conclude that Clark, standing "close" to the fight, could not have identified Ernesto as the person running after the shooting at the black men.

13. The referee found that Alice Dominguez "had credibility about what she was saying and doing," but ultimately concluded that her testimony was not credible because she could not have seen Kidd fall from where she was standing. However, the record reflects clear and convincing evidence to the contrary: photographs of the park reflect that Wright Road, where Kidd fell, was visible from the west side of the park, where the fight occurred. There is no basis to conclude that Alice Dominguez could not have seen Kidd fall from where she was standing.

barbecue area when they saw Ernesto shoot Kidd.[14]

2. Testimony that Jesus was not the shooter

Terri Clark, Alice Dominguez, Marcella Riboni, Angela Espinoza, and four additional witnesses who were not called as witnesses at Jesus's trial testified at the state habeas hearing that Jesus was in the barbecue area when the shooting occurred.

Joanna Espinoza, Jesus's girlfriend, testified that she was with Jesus when the shooting occurred. Ramona Juarez, who organized the baby shower and was not associated with the Young Crowd gang, testified that Jesus was about fifteen feet from her, in the barbecue area, when the shooting occurred. Jose Padilla, who is not a Young Crowd gang member, testified that he was cooking on the barbecue when the shooting occurred and saw Jesus about twenty feet away. Ramon Vasquez, a member of the Young Crowd gang, testified that Jesus was about ten feet from him when the shooting occurred.

There is every indication that all eight of these witnesses

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14. The referee found Marcella Riboni's and Angela Espinoza's testimony not credible because the shooting occurred "about 600 feet away." There is no basis in the record, however, to conclude that the distance between the picnic benches and the shooting was 600 feet. The diagram of the park relied on at the state habeas was not drawn to scale and does not reflect the distance between the picnic benches and any other area in the park. Moreover, it is undisputed that the shooter began running after the black men at around home plate of the baseball field, which was significantly closer to the barbecue area than where the shooting actually occurred. For both of these reasons, there is not factual basis to conclude that Marcella Riboni and Angela Espinoza, standing on a picnic bench in the barbecue area, could not have identified Ernesto as the shooter.

would have testified at Jesus's trial. The four witnesses who saw Ernesto shoot Kidd testified at the state habeas hearing that they would have offered consistent testimony at trial had they been asked or subpoenaed to testify. Their prior conduct reflects both their willingness to come forward and the consistency of their testimony: Terri Clark told Yamamoto that she saw who shot Kidd; both Angela Espinoza and Marcella Riboni told Lynn (Jesus's first lawyer's investigator) soon after the shooting that they saw Ernesto shoot Kidd; and Alice Dominguez submitted a declaration that Ernesto was the shooter in Yamamoto's motion for a new trial. Each of the four additional witnesses who testified at the state habeas hearing that they saw Jesus in the barbecue area when the shooting occurred also testified that they would have offered consistent testimony at trial had they been asked or subpoenaed to testify at Jesus's trial.

Moreover, there is a reasonable probability that Ernesto would have made an inculpatory statement or testified at trial had Yamamoto adequately investigated this case. Ernesto confessed to Denny and Lynn that he was the shooter when Denny was still representing Jesus. Ernesto again admitted he was the shooter when he testified under oath at the state habeas hearing, despite knowing that he could be prosecuted for attempted murder based on his admission. There is every reason to believe that, had Yamamoto conducted an adequate investigation and confronted Ernesto with declarations from witnesses to the shooting, Ernesto would have, at the very least, made an inculpatory statement that Yamamoto could have used to cross-examine Ernesto at trial.

The prosecution's case was not so strong that, had Yamamoto conducted an adequate investigation, there is no reasonable probability that the result of Jesus's trial would have been different. The prosecution's case rested on Kidd's and Johnson's identification of Jesus, but their testimony was not rock solid. At both the trial and the state habeas hearing, Kidd

testified that the shooter was wearing black pants, but Ernesto, not Jesus was wearing black pants at the baby shower. Kidd testified at the state habeas hearing that he was not certain that Jesus was the shooter. Travon Towner, a friend of Kidd's and Johnson's, testified at the state habeas hearing that he was running behind Kidd and Johnson when Kidd was shot, and that neither Kidd nor Johnson looked back at the shooter while they were running.

We have held that defendants were prejudiced by trial counsel's failure to investigate and present potentially exculpatory evidence where the prosecution's case was as strong or stronger than the prosecution's case against Jesus. In *Lord*, we found that defense counsel's failure to interview three witnesses who claimed to have seen the victim alive after the time of killing prejudiced the defendant, despite blood and hair evidence that tied Lord to the murder and the testimony to two inmates that Lord had confessed to them. 184 F.3d at 1095-96. In *Brown v. Myers*, 137 F.3d 1154, 1157 (9th Cir. 1998), we found that defense counsel's failure to investigate or call witness to corroborate Brown's alibi prejudiced Brown, despite the fact three witnesses testified at trial that they saw Brown shoot the victim. In *Sanders*, we found that defense counsel's failure to interview and call as a witness defendant's brother, who previously confessed to the shooting, prejudiced the defendant despite the fact that five witnesses testified at trial that Sanders was the shooter. 21 F.3d at 1456.

[6] Yamamoto's performance was deficient because he was certain that Jesus was innocent and Ernesto was guilty, and had "at [his] fingertips information that could have undermined the prosecution's case, yet chose not to develop this evidence and use it at trial." *Lord*, 184 F.3d at 1096. Had Yamamoto conducted a reasonable investigation and zealously represented Jesus at trial, four witnesses could have testified that they saw Ernesto shoot Kidd, eleven witnesses could have testified that Jesus was in the barbecue area when the shooting occurred, and

Ernesto might have come forward – or at least made an inculpatory statement that could have been used against him at trial. Having considered the totality of the evidence introduced at trial and at the state habeas hearing, as *Strickland* requires, we conclude that Yamamoto's deficient performance prejudiced Jesus because "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

CONCLUSION

For the foregoing reasons, we find that Jesus suffered from ineffective assistance of counsel. The district court's order denying Jesus's petition for writ of habeas corpus is therefore REVERSED. We REMAND to the district court and ORDER that the writ issue unless California retries the defendant within 90 days.

APPENDIX D

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CLERK, U.S. DISTRICT COURT
JUN 29 2000
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

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Filed
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ENTERED
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CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JESUS AVILA,	)	
	)	
Petitioner,	)	Civil No. SACV 98-0336-AHS (Mc)
	)	
v.	)	JUDGMENT
	)	
GEORGE GALAZA, et al.,	)	THIS CONSTITUTES NOTICE
	)	OF ENTRY AS REQUIRED BY
Respondents.	)	FRCP, RULE 77(d)

Pursuant to the order of the Court adopting the findings, conclusions and recommendations of the United States Magistrate Judge,

The petition for writ of habeas corpus is dismissed on the merits with prejudice.

Dated: October 30, 2000.

/S/
ALICEMARIE H. STOTLER
United States District Judge

APPENDIX E

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JESUS AVILA,
Petitioner
v.
GEORGE GALAZA, et al.,
Respondents.

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d).

Civil No. SACV 98-0336-AHS(Mc)

ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. section 636(b)(1)(C), the court has reviewed the pleadings and other papers herein, the Report and Recommendation of the United States Magistrate Judge, and the objections thereto, and accepts and adopts the Magistrate Judge's findings, conclusions and recommendations. The court has made a de novo determination of those portions of the report to which objection has been made.

IT IS ORDERED that the Clerk shall serve copies of this Order and the Judgment by United States Mail on the petitioner and the Attorney General for the State of California.

Dated: October 30, 2000.

/S/
ALICEMARIE H. STOTLER
United States District Judge

APPENDIX F

FILED
CLERK US DISTRICT COURT
JUN 29 2000
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESUS AVILA,	)
	) Civil No. SACV 98-0336-AHS(Mc)
Petitioner	)
	) FOURTH REPORT AND
v.	) RECOMMENDATION OF UNITED
	) STATES MAGISTRATE JUDGE
GEORGE GALAZA	) ON A PETITION FOR WRIT OF
et al.,	) HABEAS CORPUS BY A PERSON
Respondents.	) IN STATE CUSTODY
_____	)

This Fourth Report and Recommendation is submitted to the Honorable Alicemarie H. Stotler, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. This Fourth Report and Recommendation is necessary because the court mistakenly omitted addressing claims 2(g) and 2(h) in the Third Report and Recommendation, filed May 15, 2000. This court also provides additional discussion of claim 5. For the reasons

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discussed below and in the Third Report and

Recommendation, the Magistrate Judge recommends that the court deny the petition on the merits.

The court incorporates by reference the contents of the Third Report and Recommendation setting forth the procedural history, the claims and a discussion of the claims in this action.

DISCUSSION

Claim 2(g):

The petitioner contends that defense counsel, Mr. Yamamoto, rendered ineffective assistance of counsel when he failed to interview and subpoena for trial witness Marcella Riboni who would have testified that she saw Ernesto Avila commit the shooting. Assuming arguendo that Mr. Yamamoto's failure to interview and subpoena Riboni constituted deficient performance, the present claim fails because the petitioner has not demonstrated a reasonable probability that the result of the proceeding would have been different.

Riboni is the cousin of the petitioner, Jesus Avila, and his brother Ernesto Avila. [RTEH 642-643.] At the evidentiary hearing, Riboni testified that she saw Ernesto chasing one of the black males and shooting the gun. [RTEH 648.] Riboni was on top of a bench "quite a distance away from where the shots were being fired". [RTEH 648.] When Riboni got down from the bench, she looked to her right and

saw the petitioner on top of Joanna Espinoza. [RTEH 648.] Riboni told David Lynn, an investigator who worked for the petitioner's first lawyer, George Denny, what she had seen. [RTEH 651.] Riboni did not tell what she had seen to the police, the district attorney's office or anyone in authority because she was torn between favoring one cousin over the other. [RTEH 659-660.]

Judge William Pounders, the referee appointed by the California Court of Appeal to conduct a hearing on the petitioner's allegations, found that Riboni was not credible. [Answer to First Amended Petition, Ex. A, p. 61.] Judge Pounders noted that Riboni was the cousin of the petitioner. [Answer to First Amended Petition, Ex. A, p. 62.] Judge Pounders also noted that Riboni was 600 feet away from the shooting. [Answer to First Amended Petition, Ex. A, p. 62.] Judge Pounder had the opportunity personally to observe the demeanor of Riboni. A state court's finding of fact regarding the credibility of a witness whose demeanor has been observed by the state court is entitled to a presumption of correctness. 28 U.S.C. § 2254(e)(1); see Ortiz v. Stewart, 149 F.3d 923, 936 (9th Cir. 1998), cert. denied, 119 S. Ct. 1777 (1999) citing Marshall v. Lonberger, 459 U.S. 422, 434, 103 S.Ct. 843, 74 L. Ed. 2d 646 (1983). The petitioner has the burden of rebutting the presumption by clear and convincing evidence. See 28 U.S.C. § 2254 (e) (1). Judge Pounders

found that Riboni's testimony that she saw Ernesto Avila shoot the victim was not credible. The petitioner has not overcome this presumption of correctness concerning the findings of Judge Pounders.

The petitioner has not demonstrated a reasonable probability that the result of his trial would have been different if Riboni had testified that Ernesto Avila was the shooter because she was not credible. The petitioner has not demonstrated a reasonable probability that, but for Mr. Yamamoto's failure to interview and subpoena Riboni, the result of the petitioner's trial would have been different. The state court's rejection of the present claim does not involve an unreasonable application of federal law and is not based on a unreasonable determination of the facts. The court should deny claim 2(g).

Claim 2(h):

The petitioner contends that Mr. Yamamoto rendered ineffective assistance of counsel when he failed to call as a witness Terri Clark who would have testified that Ernesto Avila and not the petitioner was the shooter. The petitioner also contends that Mr. Yamamoto should have conducted a more complete interview of Clark. Assuming arguendo that Mr. Yamamoto's failure to call Clark as a witness constituted deficient performance, the present claim fails because the petitioner has not demonstrated a reasonable probability that

the result of the proceeding would have been different.

At the evidentiary hearing, Clark testified that she grew up with the petitioner and Ernesto. [RTEH 563.] Clark was in the barbecue area when she first saw the black males in the park until the time the fight broke out. [RTEH 564, 566, 590.] Clark walked toward the fight as the fight continued. [RTEH 566, 588.] Clark was "kind of close" to the fight when the black males were running. [RTEH 566-567, 589.] Clark saw Ernesto chase and shoot four or five times at the black males. [RTEH 567-568, 589-590.] Clark saw the petitioner with Joanna Espinoza in the barbecue area. [RTEH 568.]

Judge Pounders found that Clark did not present credible testimony. [Answer to First Amended Petition, Ex. A, p. 61.] Judge Pounders noted that Clark testified that she grew up with the petitioner and that, from the barbecue area, she saw Ernesto do the shooting. [Answer to First Amended Petition, Exh. A, p. 61.] Judge Pounders also noted that Clark did not inform investigator Kazuo Sakamoto that she saw Ernesto shoot at the black males. [Answer to First Amended Petition, Exh. A, p. 61.]

A review of the record shows that Clark did not testify that she was in the barbecue area when she saw Ernesto shoot at the black males. Clark testified that she was "kind of close" to the area where the fight had broken out when she

saw Ernesto shoot. [RTEH 566-567, 589.]

Although Judge Pounders was mistaken about Clark's exact testimony, this court cannot overturn Judge Pounders' credibility finding because he had the opportunity personally to observe Clark's demeanor. Judge Pounder's finding that Clark was not credible is entitled to a presumption of correctness. See 28 U.S.C. § 2254(e)(1); Ortiz v. Stewart 149 F. 3d at 936. The petitioner has the burden of rebutting the presumption by clear and convincing evidence. See 28 U.S.C. § 2254(e)(1). The petitioner has not overcome the presumption.

The petitioner has not demonstrated a reasonable probability that the result of his trial would have been different if Clark had testified that Ernesto was the shooter because she was not credible. The petitioner has not demonstrated a reasonable probability that, but for Mr. Yamamoto's failure to call Clark as a witness or further interview Clark, the result of the petitioner's trial would have been different. The state court's rejection of the present claim does not involve an unreasonable application of federal law and is not based on an unreasonable determination of the facts. The court should deny claim 2(h).

Claim 5:

The petitioner contends in his opening that he withdrew claim 5 only to the extent that the claim was based upon tapes

of interviews with Joanne Espinoza, Elizabeth Luis and Rosa Luis. A review of the petitioner's First Amended Petition shows that the petitioner also alleged that the following constituted newly discovered exculpatory evidence that Denny did not turn over to Yamamoto.

(d) a written statement made by the petitioner;

(e) a written statement made by Joanne Espinoza;

(f) a written statement made by Elizabeth Luis;

(g) a written statement made by Rosa Luis;

(h) David Lynn's knowledge that there were other key witnesses;

(i) David Lynn's knowledge of the substance of his interview with Angela Espinoza;

(j) David Lynn's knowledge of the substance of his interview with Marcella Riboni; and

(k) David Lynn's knowledge that witnesses other than Ernesto told him that Ernesto was the shooter.

A claim based on newly discovered evidence does not warrant habeas relief absent a constitutional violation occurring in the underlying state criminal proceeding. See Herrera v. Collins, 506 U.S. 390, 400, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993).

The petitioner has not alleged an independent constitutional violation in the underlying trial beyond a vague parenthetical reference to a "[d]ue process violation". [First

Amended Petition, p. 19.] Also, the petitioner has not cited any cases to support the claim or to indicate to the court the basis of the claim. This vague reference to due process is sufficient to raise a claim of a constitutional violation.

The present claim appears to be a claim of actual innocence. The United States Supreme Court has never held that actual innocence warrants habeas relief. However, in Herrera v. Collins, 506 U.S. at 417, the Supreme Court assumed, without deciding, "that in a capital case a truly persuasive demonstration of 'actual innocense' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief." Id.; see also Carriger v. Stewart, 132 F.3d 463, 476 (9th Cir. 1997). The court did not specify what showing would be required for a habeas petitioner to make out a successful claim of actual innocence. The court stated only that the "threshold showing for such an assumed right would necessarily be extraordinarily high." Id. In Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995), the court stated that habeas relief could not be granted unless the newly discovered evidence unquestionably established the petitioner's innocence. See Schlup v. Delo, 513 U.S. at 317.

In Claims 5(d), (e), (f) and (g), the petitioner alleges that the written statements made by the petitioner, Joanne Espinoza, Elizabeth Luis, and Rosa Luis Contained in David

Lynn's files constituted newly discovered evidence. The court may grant habeas relief only if the statements made by petitioner, Joanna Espinoza, Elizabeth Luis, and Rosa Luis unquestionably establish the petitioner's innocence.

The petitioner has not shown that the statements unquestionably establish the petitioner's innocence. The petitioner has not specifically alleged what was in the statements or how they establish the petitioner's innocence. Thus, claims 5 (d), (e), (f) and (g) are conclusory allegations which the court should deny. See James v. Borg, 24 F.3d at 26.

Claims 5(h), (i), (j) and (k) all concern information within the knowledge of David Lynn, specifically Lynn's knowledge that there were other key witnesses, his knowledge of the substance of his interviews with Angela Espinoza and Marcella Riboni and his knowledge that witnesses other than Ernesto told him that Ernesto was the shooter. The petitioner has not shown that information within Lynn's knowledge unquestionably establishes the petitioner's innocence. The petitioner has not specifically alleged the substance of Lynn's knowledge or how it establishes the petitioner's innocence. Thus, claims 5(h), (i), (j) and (k) are conclusory allegations which the court should deny. See id.

Furthermore, the court notes that Romel Johnson testified at trial and at the evidentiary hearing before Judge

Pounders that he saw the petitioner shoot Kidd. [RTEH 898-899.] Johnson was absolutely positive that the petitioner was the shooter because he remembered his face. [RTEH 969-970, 990.] The petitioner has not unquestionably established his innocence.

The court should deny claims 5(d), (e), (f), (g), (h), (i), (j) and (k).

RECOMMENDATION

In the light of the foregoing, the magistrate judge recommends that the court issue an Order: (1) approving and adopting the Third Report and Recommendation and the Fourth Report Recommendation; and (2) directing that judgment be entered dismissing the petition on the merits with prejudice.

DATED: June 29, 2000

/S/
JAMES W. McMAHON
United States Magistrate Judge

APPENDIX G

FILED
CLERK US DISTRICT COURT
MAY 15 2000
CENTRAL DISTRICT OF CALIFORNIA
BY /S/ DEPUTY

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JESUS AVILA, Petitioner, v. GEORGE GALAZA, et al. Respondents.	Civil No. SACV 98-0336-AHS (Mc) THIRD REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE ON A PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

This Third Report and Recommendation is submitted to the Honorable Alicemarie H. Stotler, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons discussed below, the Magistrate Judge recommends that the court deny the petition on the merits.

SUMMARY

This is a petition for writ of habeas corpus. The petitioner, Jesus Avila, was convicted in the Los Angeles County Superior Court of attempted murder and sentenced to

a life term. The crime for which the petitioner was convicted was a shooting which occurred in an interracial confrontation in a public park and was apparently witnessed by at least 40 people. A few of these people testified at the petitioner's trial, all to the effect that the petitioner was in another section of the park, approximately 600 feet away, at the time of the shooting. Despite this testimony, the petitioner was convicted of attempted murder.

The petitioner now claims that he is actually innocent of the offense, that the crime was in fact committed by his brother, Ernesto Avila, that numerous witnesses were available at the time of the trial to testify that Ernesto was the shooter, that Ernesto confessed committing the crime to attorney George Denny, who at the time represented both the petitioner and Ernesto, that Mr. Denny declared a conflict and ceased representing the petitioner, that Mr. Denny rendered ineffective assistance of counsel by not conveying non-privileged investigative material to Ted Yamamoto, the petitioner's lawyer at the preliminary hearing and the trial, that attorney Ted Yamamoto rendered ineffective assistance of counsel by not conducting an adequate investigation which would have resulted in the discovery and trial testimony of witnesses who would have testified that Ernesto Avila, not petitioner Jesus Avila, was the person who shot the victim in the park, and that this testimony would likely have resulted in

the acquittal of the petitioner at his trial.

The petitioner made substantially similar claims in a habeas petition in the California Court of Appeal. The California Court of Appeal appointed Los Angeles County Superior Court Judge William Pounders as a referee to conduct a hearing on the petitioner's allegations. Judge Pounders conducted a ten day evidentiary hearing and made factual findings which do not support the petitioner's claims. The California Court of Appeal adopted these findings. It is presumed that the California Supreme Court adopted these findings.

The factual findings of Judge Pounders essentially bar the relief sought by the petitioner in this court. The applicable law provides that the petitioner's habeas petition:

> "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

28 U.S.C. § 2254(d). The applicable law further provides that "a determination of a factual issue made by a State court shall be presumed to be correct," and that the petitioner has "the burden of rebutting the presumption of correctness by

clear and convincing evidence." 28 U.S.C. § 2254 (e) (1). On the present showing, this court cannot f ind that the state court f actual findings constitute an unreasonable determination of the facts in the light of the evidence presented at the petitioner's trial and the habeas evidentiary hearing. There is a presumption created by law that the findings of Judge Pounders are correct. The petitioner has not carried his burden of rebutting the findings of Judge Pounders by clear and convincing evidence. For these reasons, the magistrate judge recommends that the court deny the petition on the merits.

PROCEDURAL BACKGROUND

The petitioner is a state prisoner. After a jury trial in the Los Angeles County Superior Court, the petitioner was found guilty of attempted murder. The jury also found that the petitioner used a firearm, inflicted great bodily injury, and acted wilfully, deliberately, and with premeditation in the commission of the crime. The trial court sentenced the petitioner to a term of life with the possibility of parole, plus 8 years. [Return, Ex. A.] The California Court of Appeal affirmed the judgment and denied the petitioner's habeas corpus petition. [Return, Ex. B & C.] The California Supreme Court denied the petitioner's state habeas corpus petition. [Return, Ex. D, p. 45.]

The petitioner filed a petition for writ of habeas corpus

in this court which the court dismissed for failure to exhaust state remedies. The petitioner then filed the present petition for writ of habeas corpus. This court dismissed the initial petition as facially deficient, with leave to file an amended petition. The petitioner then filed his first amended petition which is now before the court. The first amended petition alleges various instances of ineffective assistance of counsel by George Denny (petitioner's pre-trial counsel) Ted Yamamoto (petitioner's trial counsel), and contends that the petitioner is entitled to a new trial due to newly discovered evidence "that Ernesto Avila, the petitioner's brother, committed the crime.

In response, the respondent filed a return to the first amended petition. The respondent contended that the petitioner had not exhausted his available state court remedies as to some of his claims.

By two previous Reports and Recommendations, the magistrate judge recommended that the court dismiss the petition for failure of the petitioner to exhaust all or portions of claims 2, 3, 4, and 5, unless the petitioner elected to dismiss the unexhausted aspects of the claims. On May 10, 1999, the petitioner filed a Withdrawal of Unexhausted Claims withdrawing all of the unexhausted claims, specifically, claim 2 (a) , claim 2 (g) , claim 2 (h) , claim 3 (e) (2) , claim 3 (h) , claim 4 (g) , claim 5 (a) , claim 5 (b) , and

claim 5 (c) The remaining claims listed for the sake of consistency with the same designations as used in the two earlier Reports and Recommendations are as follows:

Claim 1:

The petitioner's pre-trial counsel, Mr. Denny, was ineffective because he did not give the petitioner's trial counsel, Mr. Yamamoto, exculpatory information which Mr. Denny had obtained from third party eyewitnesses that the petitioner's brother, Ernesto Avila, was the shooter. In particular, Mr. Denny did not advise Mr. Yamamoto that Denny's investigator had obtained statements from third party witnesses Angela Espinoza and Marcella Riboni that identified Ernesto Avila as the shooter.

Claim 2:

The petitioner's trial counsel, Mr. Yamamoto, was ineffective because he failed to present a defense of third party culpability. In particular, Mr. Yamamoto and his investigator:

(a) [withdrawn by the petitioner];

(b) failed to interview Ernesto Avila and failed to seek to have Ernesto Avila testify at the petitioner's trial;

(c) failed to ask the petitioner's pre-trial lawyer, Mr. Denny, if Mr. Denny had any nonprivileged investigative material to pass on to Yamamoto;

(d) did not request Ernesto Avila to waive the

attorney-client privilege existing between Ernesto Avila, on the one hand, and Mr. Denny and Mr. Denny's investigator, on the other hand, in circumstances in which Ernesto Avila had confessed to Mr. Denny and Mr. Denny's investigator that Ernesto Avila was the shooter;

(e) failed to interview and subpoena for trial witness Angela Espinoza who would have testified that Ernesto Avila and not the petitioner was the shooter;

(f) failed to interview and subpoena for trial witness Alice Dominguez who would have testified that Ernesto Avila and not the petitioner was the shooter;

(g) [withdrawn by the petitioner];

(h) [withdrawn by the petitioner]; and

(i) failed to conduct a thorough and diligent investigation to find witnesses to the shooting, including a failure by the investigator to follow-up telephone calls to teenage eyewitnesses who did not return telephone messages.

Claim 3:

The petitioner's trial counsel, Mr. Yamamoto, was ineffective because he failed thoroughly to pursue an alibi defense. In particular, Mr. Yamamoto:

(a) failed to identify, locate and subpoena all of the 40 people in the park at the time of the shooting;

(b) failed to interview and subpoena Jose Padilla who could have testified that the petitioner was not the shooter

because he saw the petitioner in another section of the park at the time when the shooting occurred;

(c) failed to interview and subpoena Ramona ("Mona") Juarez who could have testified that the petitioner was not the shooter because she saw the petitioner in another section of the park at the time when the shooting occurred;

(d) failed to interview and subpoena Ramon Vasquez who could have testified that the petitioner was not the shooter because he saw the petitioner in another section of the park at the time when the shooting occurred;

(e) failed to subpoena Joanne Espinoza who could have testified:

(1) that the petitioner was not the shooter because she saw the petitioner in another section of the park at the time when the shooting occurred;

(2) [withdrawn by petitioner];

(f) failed to interview and subpoena Rosa Luis who could have testified that Alice Dominguez stated immediately after the shooting that Ernesto Avila was the shooter;

(g) presented a weak alibi witness at the trial by presenting the testimony of Estella ("Blanca") Montoya; and

(h) [withdrawn by the petitioner].

Claim 4:

The petitioner's trial counsel, Mr. Yamamoto, was ineffective because he failed to discover evidence which

would have impeached certain prosecution witnesses. In particular, trial counsel:

(a) failed to investigate the criminal background of prosecution witnesses Demetrius Kidd and Romel Johnson, one of whom was on probation and one of whom may have been on probation at the time of the trial;

(b) failed to pursue and present evidence regarding the gang affiliations of prosecution witnesses Demetrius Kidd and Teavious Whatley, which would have tended to impeach testimony of prosecution witnesses who denied engaging in spray painting a wall with gang graffiti immediately before the shooting;

(c) failed to interview and present witness Travon Towner whose testimony would have undermined the reliability of the observations of prosecution witnesses Demetrius Kidd and Romel Johnson by showing that both were running away from, and did not look back at, the shooter;

(d) failed to investigate and discover evidence that, within a day or two after the shooting, a city painting crew painted over graffiti placed on the park wall by the prosecution witnesses;

(e) failed to investigate evidence of possibly suggestive identification procedures used by the police with prosecution witnesses who identified the petitioner as the shooter;

(f) failed to consult with or seek funds for presenting the testimony of an eyewitness identification expert;

(g) [withdrawn by the petitioner]; and

(h) failed to impeach details in the testimony of prosecution witness Romel Johnson.

Claim 5:

The petitioner is entitled to a new trial due to newly discovered exculpatory evidence that the petitioner's brother, Ernesto Avila, was the shooter, which evidence was in pre-trial counsel's, Mr. Denny's, investigation file but which was not turned over to trial counsel, Mr. Yamamoto. In particular, there is newly discovered evidence from witnesses:

(a) [withdrawn by the petitioner];

(b) [withdrawn by the petitioner]; and

(c) [withdrawn by the petitioner].

The respondent filed an answer to the remaining claims. The petitioner filed a traverse.

RELEVANT FACTUAL BACKGROUND

The Petitioner's Trial and Appeal

The evidence at trial established that, on August 19, 1990, the petitioner was attending a baby shower at Ham Park in Lynwood. The petitioner approached Demetrius Kidd and Romel Johnson and showed them his tattoos. When the petitioner asked Johnson and Kidd which gang they belonged

to, Johnson explained that they were from Los Angeles and did not know anything about local gangs. The petitioner left, and returned a few minutes later with a group of friends. The petitioner then warned Kidd and Johnson's group that his group would kill them if they did not leave "their park." As the petitioner's group surrounded the other group, the petitioner ran toward an opening in the park fence, then returned, running toward Kidd's group with a gun in his hand. A fight broke out and shots were fired. As Kidd ran away, the petitioner shot Kidd behind the left ear. Kidd fell down, got back up, and saw the petitioner running towards him and firing at him. [Return, Ex. B, p. 13-15.1][1/]

Sheriff's deputies arrived, and Johnson provided a description of the petitioner, including his tattoos. The petitioner was taken into custody and brought to Johnson who identified the petitioner as the shooter. Kidd also identified the petitioner as the shooter. [Return, Ex. B, p. 15.] The petitioner was taken to the police station and a gunshot residue test was performed. The results were inconclusive. [Return, Ex. B, p. 17-18.]

In his defense, the petitioner claimed that, after discussing his tattoos with a group of men, he went to prepare his food. He saw one group approach the other group and

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1. References are to the Court of Appeal's opinion, Return, Ex. B.]

then heard gunshots. [Return, Ex. B p. 16-17.]

The petitioner was initially represented at the pre-preliminary hearing phase by attorney George Denny who was assisted by an investigator, David Lynn. [Reporter's Transcript of Evidentiary Hearing ("RTEH") 116.] Mr. Denny declared a conflict when he learned from Mr. Lynn and then Ernesto Avila that Ernesto Avila, not the petitioner, had fired the shots in Ham Park. [RTEH 118.] Mr. Denny represented Ernesto Avila in another criminal case. [RTEH 46, 126-127.] Mr. Denny indicated that the nature of the conflict was that he was representing someone in another matter whom he felt might be the shooter. [RTEH 709-710.]

Attorney Ted Yamamoto was appointed to represent the petitioner and Kazuo Sakamoto was appointed as Mr. Yamamoto's investigator. [RTEH 715-716.] Mr. Yamamoto received the file without any investigative material and did not ask whether there had been a previous investigation. [RTEH 712, 715.] Mr. Yamamoto got the impression that Ernesto Avila was the shooter when he asked the petitioner who might be the shooter and the petitioner "would always just get silent." [RTEH 723-724.]

Mr. Yamamoto represented the petitioner at trial. He presented the defense of alibi, that the petitioner was at the other end of the park when the shooting took place. [RTEH 741-742.] Mr. Yamamoto believed that he provided

ineffective assistance of counsel because he have excused himself when he felt that he was restrained from revealing Ernesto Avila's possible involvement. [RTEH 781.]

Following the petitioner's conviction for attempted willful, deliberate, and premeditated murder with the use of a firearm and with the intentional infliction of great bodily injury, the petitioner moved for a new trial based on newly discovered evidence which showed that his brother, Ernesto Avila, was the shooter. [Reporter's Transcript of Trial ("RT") 678.] The trial court denied the motion. [RT 692.] The California Court of Appeal affirmed the judgment on appeal. [Return, Ex. B, p. 22.]

The Petitioner's State Habeas Petitions and Evidentiary Hearing

The petitioner then filed a petition for writ of habeas corpus in the California Court of Appeal. That court referred the matter to Los Angeles Superior Court Judge William Pounders as a referee to conduct a hearing regarding the petitioner's claim that he was denied the ineffective assistance of trial counsel. [Return, Ex. C, p. 23.]

During a ten-day evidentiary hearing, twenty-three witnesses testified before Judge Pounders, including George Denny, David Lynn, Ted Yamamoto, Kazuo Sakamoto, Ernesto Avila, Angela Espinoza, Marcella Riboni, Alice Dominguez, Jose Padilla, Ramona Juarez, Ramon Vasquez,

Joanne Espinoza, Rosa Luis, Estella Montoya, Demetrius Kidd, Romel Johnson and Travon Towner.

Judge Pounders prepared a Referee's Report in which he summarized the testimony taken and made the following Findings of Fact and reached the following conclusion:

1. TRIAL COUNSEL TED YAMAMOTO DID NOT FAIL TO INVESTIGATE AND PRODUCE POTENTIAL WITNESSES TO THE SHOOTING.

a. Although he felt an Obligation to go along with his client's unexpressed sentiments that he not necessarily go after his client's brother, Mr. Yamamoto told his investigator to see what he could find.

b. Mr. Sakamoto spent 135 hours investigating this case, but much of it was wasted with unnecessary hours of attorney conferences.

c. No one contacted during the investigation told Mr. Sakamoto or Mr. Yamamoto that Ernesto Avila was the shooter.

d. Ernesto Avila told Mr. Sakamoto that he was not at the park when the shooting started.

e. The only persons Ernesto Avila told that he was the shooter were two homeboys whose names he could not remember.

f. Ernesto Avila, Joanna Espinoza, and Elizabeth

Luis agreed to get information on the other persons present [in the park] during the shooting, but they never did.

g. Petitioner never gave Mr. Sakamoto the names of any other witnesses.

h. Inquiry by Mr. Yamamoto as to Mr. Denny's reasons for declaring a conflict would not have been productive because Ernesto was his client and there was no reason to believe his own investigation would not produce the same results.

i. Mr. Yamamoto did not try to identify all persons depicted in the photographs taken at the Baby Shower [being held in the park at the time of the shooting] because of the difficulty in getting cooperation from some of the male witnesses and they would not be good witnesses. They were throwing gang signs in the photographs. He did, however, ask Iasmin Luis, who took some of the photographs, to identify all of the people she saw at the Baby Shower.

j. Alfredo Sanchez was an independent and disinterested witness who corroborated those at the Baby Shower who placed petitioner in the vicinity of the barbecue, rather than the distant location of the shooting.

k. The additional witnesses produced at the reference hearing were not available to the defense team

due to the lack of cooperation of those contacted and the absence of a confession of guilt by Ernesto Avila until more than two years after the trial.

l. The additional witnesses who placed petitioner in the barbecue area [in the park] at the time of the shooting but could not see the shooter because of the hill and the great distance, would have presented cumulative evidence.

m. The four additional witnesses who testified that they saw Ernesto Avila fire the shots did not present credible testimony. From the area of the wall, Alice Dominguez testified she could see Ernesto chase one black guy and shoot at him three times. She saw the victim fall. Mr. Kidd actually fell across the street from the park. Even Ernesto Avila testified that he did not see the victim fall.

From the same barbecue area where Jose Padilla and others could not see the shooting and Joanna Espinoza could not even tell the direction the shots were fired from, Terri Clark, who grew up with the petitioner, testified that she saw Ernesto do the shooting. She did not provide this information to the defense investigator.

Angela Espinoza, whose sister was the mother of petitioner's child, was standing on a picnic bench when she saw Ernesto do the shooting "not that far" away.

Standing on top of a bench, petitioner's cousin Marcella Riboni saw Ernesto do the shooting. The shooting was about 600 feet away.

2. MR. YAMAMOTO DID NOT FAIL TO DISCOVER FAVORABLE EVIDENCE.

a. Graffiti sprayed on the park wall on August 19, 1990, would have been removed by the Lynwood Graffiti Program on the 19th or the 20th, but no such record exists.

b. The record of graffiti removal for August 21, 1990, does not corroborate defense witnesses that Crip gang graffiti was sprayed.

c. Of the five black teenagers who were involved in the altercation, two were gang members. Teavious Whatley was a member of the Rolling 60s. Mr. Kidd was apparently a member of the Block Crip Gang. This information would have provided some support for the trial testimony that the victims had been writing on the wall. The issue was not critical, the graffiti being apparently the cause of the altercation, but it was not a justification for the shooting. Gang affiliations came out in the cross-examination of petitioner at trial. The defense decision not to emphasize gang affiliation was a valid trial tactic.

d. Demetrius Kidd was on juvenile probation at the

time of trial. Romel Johnson may have been on juvenile probation. Mr. Yamamoto filed a formal discovery motion for criminal history information. Trial prosecutor Greta Walker provided everything she had. She never offered to help Mr. Kidd with his probation matter. Further discovery would not have led to admissible impeachment.

e. The broadcast procedures employed by the sheriff's deputies at the in-field identification were not suggestive.

3. MR. YAMAMOTO DID NOT FAIL TO IMPEACH ROMEL JOHNSON.

a . The testimony of Deputy Gittisarn at the hearing as to whether Mr. Johnson identified petitioner as the Hispanic who threatened him in the park was substantially the same as Mr. Johnson's trial testimony.

b. There is not [an] inconsistency between Mr. Johnson's description of petitioner's securing the handgun by "creeping" away to the fence and his description of petitioner drawing the gun from his waistband during the chase. The deputy taking the report did not ask him about how the gun was acquired.

c. Romel Johnson was an exceptionally persuasive witness.

4. MR. YAMAMOTO DID NOT FAIL TO CALL

LOGICAL WITNESSES.

a. Co-defendant Nieves was not available as a witness at trial and counsel was not required to anticipate the Motion for New Trial. The prosecutor was specifically delaying a disposition of Mr. Nieves' case until after petitioner's trial.

b. Joanna Espinoza was in fact interviewed by both Mr. Yamamoto and Mr. Sakamoto. She was not called as a witness because she was uncooperative and the jury would not give her testimony much weight due to the fact that petitioner is the father of her child.

c. Even though Joanna Espinoza was interviewed and was supposed to tell investigator Sakamoto who was present during the shooting, she did not even reveal the identity of her sister, Angela.

d. Angela Espinoza was not a credible witness.

e. Given the extensive contact between petitioner and the victims during the conversations and showing of tattoos as well as the immediate identification made at the scene, a witness identification expert was not essential. CALJIC 2.92 was sufficient to identify the significant issues. Petitioner and his brother Ernesto, were not so similar in appearance as to allow a mistaken identification.

CONCLUSION

> Trial counsel Ted Yamamoto provided effective and competent assistance at the time of petitioner's trial. His reliance on the independent testimony of Alfredo Sanchez, rather than other witnesses associated with the Young Crowd Gang, was a valid tactic. Due to consistent lack of cooperation from the immediate witnesses, he never had access to admissible evidence, however credible, identifying the actual shooter as Ernesto Avila. The compelling testimony of victim Romel Johnson was an obstacle he could not overcome.

[Answer to First Amended Petition, Ex. A, p. 59-65. Citations to record omitted.]

Judge Pounders, acting as the referee, concluded that Mr. Yamamoto provided effective and competent assistance at the time of petitioner's trial. [Answer to First Amended Petition, Ex. A, p. 19.] The California Court of Appeal adopted the referee's conclusion that the petitioner had been afforded effective assistance of trial counsel and denied the petition. [Return, Ex. C, p. 24.] The California Supreme Court also denied the petitioner's habeas corpus petition. [Return, Ex. D, p. 45.]

DISCUSSION

Standard of Review

This case was initially filed on October 21, 1996 as Case No. CV- 96-7390 GHK (JG) and later reassigned and

re-designated as Case No. SACV 98-0336 AHS (Mc). The case was filed after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and AEDPA' s provisions apply. Lindh v. Murphy, 521 U.S. 320, 326-27, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997); Jeffries v. Wood, 114 F.3d 1484 (9th Cir. 1997). Under AEDPA, this court may not grant an application for a writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) resulted in a decision that was based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d); Terry Williams v. Taylor, ___U.S. ___, 120 S.Ct. 1495, ___ L.Ed.2d (2000).

As noted above, the petitioner filed a state habeas petition in the California Court of Appeal. That court referred the matter to Judge Pounders as a referee to conduct a hearing regarding the petitioner's claim that he was denied the effective assistance of trial counsel. [Return, Ex. C, p. 23.] Following a ten day evidentiary hearing during which twenty-three witnesses testified, the referee made numerous

factual and legal findings. The referee concluded that trial counsel Ted Yamamoto provided effective and competent assistance at the time of petitioner's trial. [Return, Ex. C, p. 44.] The Court of Appeal adopted the referee's findings and his conclusion that the petitioner had been afforded effective assistance of trial counsel and denied the petition. [Return, Ex. C, p. 24.]

The petitioner subsequently filed a state habeas petition in the California Supreme Court. The California Supreme Court denied the petitioner's habeas corpus petition without citation or other explanation for its decision. [Return, Ex. D, p. 45.] Where there is one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground (the "look-through doctrine,"). Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). Thus, the California Supreme Court's rejection of the claims previously presented in the state habeas petition filed in the California Court of Appeal are deemed to rest upon the same grounds provided by the California Court of Appeal, i.e., the reasons provided in the report of Judge Pounders.

Claim 1

The petitioner contends that Mr. Denny was ineffective because Mr. Denny did not give Mr. Yamamoto exculpatory information which Mr. Denny had obtained from third party

eyewitnesses that the petitioner's brother, Ernesto Avila, was the shooter. In particular, Mr. Denny did not advise Mr. Yamamoto that Mr. Denny' s investigator had obtained statements from third party witnesses Angela Espinoza and Marcella Riboni that identified Ernesto Avila as the shooter.

The petitioner did not present claim 1 in his state habeas petition filed in the California Court of Appeal. [Declaration of Nancy S. Coan Re Exhaustion, Ex. B.] In that state habeas petition, the petitioner claimed only that Mr. Yamamoto was ineffective. The petitioner raised claim 1, the claim that Mr. Denny was ineffective, for the first time in his state habeas petition in the California Supreme Court. [Return, filed February 17, 1998, Ex. D, p. 81-82, 106.] Thus, although the California Supreme Court denied the state habeas petition without citation or comment explaining its decision, the look-through doctrine does not apply to claim 1. See Ylst v. Nunnemaker, 501 U.S. at 803. [Return, Ex. D, p. 45.] The California Supreme Court denied claim 1 without issuing a written decision articulating the basis of its decision. "[W]hen a state court does not articulate the rationale for its determination, a review of that "court's 'application' of clearly established federal law is not possible." Delgado v. Lewis, 181 F.3d 1087, 1091 (9th Cir. 1999), judgment vacated on other grounds Lewis v. Garcia Delgado, ___ U.S ___,120 S.Ct. 1002, ___ L.Ed.2d ___ (2000). In these

circumstances, this court must make an independent review of the record and of relevant federal law to determine if the decision of the California Supreme Court denying claim 1 was "contrary to, or involved an unreasonable applicable of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254 (d) (1); Delgado v. Lewis, 181 F.3d at 1091.

In conducting its independent review and determination, this court must presume that the factual determinations of the state court are unless the petitioner has rebutted those factual determinations by clear and convincing evidence. 28 U.S.C. §12254 (e) (1). The petitioner contends in claim 1 that attorney George Denny provided ineffective assistance of counsel when Mr. Denny did not provide information to the petitioner's trial counsel, Ted Yamamoto, that two witnesses, Angela Espinoza and Marcella Riboni, had identified Ernesto as the shooter. Both of these witnesses testified in the hearing before Judge Pounders. Judge Pounders specifically found that both witnesses were not credible. [Answer to First Amended Petition, Ex. A, pp. 61-62.] This court must presume that Angela Espinoza and Marcella Riboni were not credible witnesses unless the petitioner rebuts the finding of lack of credibility of each by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

To show ineffective assistance of counsel, the petitioner

must demonstrate (1) that his counsel's performance was deficient, and (2) that the deficient performance prejudiced his defense. Lockhart v. Fretwell, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1989). The petitioner, must prove both elements. The court may reject a claim of ineffective assistance of counsel upon finding either that counsel's performance was reasonable or that the claimed error was not prejudicial. Strickland v. Washington, 466 U.S. at 697. Review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. United States v. Quintero-Barraza, 78 F.3d 1344, 1348 (9th Cir. 1995); see Strickland v. Washington, 466 U.S. at 689-90.

To establish deficient performance, the defendant "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Strickland v. Washington, 466 U.S. at 690. The court must judge the reasonableness of counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. In conducting its inquiry, the court must "determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance." Id. Counsel is strongly

presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional Judgment. Id. "Judicial scrutiny of counsel's performance must be highly deferential." Id. at 689.

Second, the defendant must establish prejudice resulting from his attorney's conduct. Id. 466 U.S. at 692. "The defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have a reasonable doubt about guilt." Id. at 695. To show prejudice, a petitioner must demonstrate that the deficient performance of his trial counsel rendered "the result of the trial unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, 506 U.S. at 372.

Here, the petitioner claims that Mr. Denny rendered ineffective assistance of counsel when Mr. Denny failed to advise Mr. Yamamoto that Mr. Denny's investigator had obtained statements from Angela Espinoza and Marcella Riboni ("Riboni") that identified Ernesto Avila ("Ernesto") as the shooter. Assuming arguendo that Mr. Denny's failure to advise Mr. Yamamoto of the statements of Angela Espinoza and Marcella Riboni was outside the range of professionally competent assistance, claim 1 fails because the

petitioner cannot show that the omission resulted in prejudice. Noting that both witnesses were about 600 feet away from the shooting, Judge Pounders found that the testimony of both Angela Espinoza and Riboni that each saw Ernesto commit the shooting was not credible. [Answer to First Amended Petition Ex. A, p. 62-63.]

A state court's finding of fact regarding the credibility of a witness whose demeanor has been observed by the state court is entitled to a presumption of correctness. 28 U.S.C. 2254(e)(1); see Ortiz v. Stewart, 149 F.3d 923, 936 (9th Cir. 1998) citing Marshall v. Lonberger, 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).[2/] Both Angela Espinoza and Riboni testified at the hearing before Judge Pounders. Judge Pounders was able personally to observe their demeanor. The petitioner has not overcome the presumption of correctness of the factual findings of Judge Pounders that Angela Espinoza and Riboni were not credible witnesses. Judge Pounders, findings regarding the credibility of Angela Espinoza and Riboni was not based on an unreasonable determination of the facts in light of the evidence presented in the evidentiary hearing. See 28 U.S. 2254(d)(2). Mr.

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2. Ortiz was decided pursuant to 28 U.S.C. § 2254 before it was amended by the Anti-terrorism and Effective Death Penalty Act in 1996. The present version of § 2254 is more deferential to state court findings. See 28 U.S.C. § 2254(d) and (e)(1).

Denny's failure to advise Mr. Yamamoto of witness statements which were not credible did not result in a reasonable probability that the result of the proceeding would have been different. See Strickland v. Washington, 466 U.S. at 694. The court should deny claim number 1.

Furthermore, the petitioner has not shown that any investigation prompted by the non-credible statements of Angela Espinoza and Riboni would have resulted in the discovery of credible evidence that Ernesto was the shooter. Judge Pounders found that the testimony of the four witnesses who each stated that each saw Ernesto fire the shots was not credible. [Answer to First Amended Petition, p. 61-62.] All of these witnesses testified at the hearing before Judge Pounders and he was personally able to observe their demeanor. Judge Pounders' findings that the witnesses were not credible is entitled to a presumption of correctness. The petitioner has not overcome the presumption. The petitioner has not shown that any credible, admissible evidence would have been discovered if Mr. Denny had provided Mr. Yamamoto with the statements of Angela Espinoza or Riboni. The petitioner has not shown that Mr. Denny's failure to advise Mr. Yamamoto of the results of Denny's investigation resulted in prejudice. The court should deny claim 1.

Claim 2

The petitioner contends that Mr. Yamamoto was ineffective because he failed to present a defense of third party culpability. In particular, the petitioner claims that Mr. Yamamoto and his investigator:

(b) failed to interview Ernesto Avila and failed to seek to have to Ernesto Avila testify at the petitioner's trial;

(c) failed to ask Mr. Denny if Mr. Denny had any nonprivileged investigative material to pass on to Mr. Yamamoto;

(d) did not request Ernesto Avila to waive the attorney-client privilege existing between Ernesto Avila, on the one hand, and Mr. Denny and Mr. Denny's investigator, on the other hand, in circumstances in which Ernesto had confessed to Mr. Denny and Mr. Denny's investigator that Ernesto was the shooter;

(e) failed to interview and subpoena for trial witness Angela Espinoza who would have testified that Ernesto Avila and not the petitioner was the shooter;

(f) failed to interview and subpoena for trial witness Alice Dominguez who would have testified that Ernesto Avila and not the petitioner was the shooter; and

(i) failed to conduct a thorough and diligent investigation to find witnesses to the shooting, including a failure by the investigator to follow-up telephone calls to teenage eyewitnesses who did not return telephone messages.

As noted above, Judge Pounders presided over a ten-day evidentiary hearing regarding the petitioner's claim that Mr. Yamamoto was ineffective. [Declaration of Nancy S. Coan, Vol. II, Exh. KK.] After taking testimony from 23 witnesses, including George Denny, David Lynn, Ted Yamamoto, Kazuo Sakamoto, Ernesto Avila ("Ernesto"), Angela Espinosa ("Angela"), Marcella Riboni ("Riboni"), Alice Dominguez ("Dominguez"), Jose Padilla ("Padilla"), Ramona Juarez ("Juarez"), Ramon Vasquez ("Vasquez"), Joanne Espinoza ("Joanne"), Rosa Luis ("Rosa"), Estella Montoya ("Montoya"), Demetrius Kidd ("Kidd"), Romel Johnson ("Johnson") and Travon Towner ("Towner"), and hearing argument from counsel, Judge Pounders concluded:

Trial counsel Ted Yamamoto provided effective and competent assistance at the time of petitioner's trial. His reliance on the independent testimony of Alfredo Sanchez, rather than other witnesses associated with the Young Crowd Gang, was a valid tactic. Due to consistent lack of cooperation from the immediate witnesses, he never had access to admissible evidence, however credible, identifying the actual shooter as Ernesto Avila. The compelling testimony of victim Romel Johnson was an obstacle he could not overcome.

[Answer to First Amended Petition, Ex. A, p. 65.]

The court will discuss in detail the specific testimony of

relevant witnesses and specific findings of Judge Pounders below.

Claim 2(b)

The petitioner contends that Mr. Yamamoto's failure to interview Ernesto Avila and to seek to have Ernesto testify at the petitioner's 24 trial constituted ineffective assistance of counsel.

Ernesto testified at the evidentiary hearing before Judge Pounders. Ernesto testified that he was at the baby shower in Ham Park on August 19, 1990. [RTEH 20, 24.] Ernesto testified that he was the individual who chased three black males across the park and fired a couple of shots at them. [RTEH 41-42.] Ernesto did not see anyone fall down. [RTEH 42, 82-83.] After firing the shots, Ernesto ran away. [RTEH 42.] Some time later, Ernesto spoke to Mr. Denny and his investigator, Mr. Lynn. [RTEH 43.] Ernesto testified that he told Mr. Denny and Mr. Lynn that the petitioner was not the shooter. [RTEH 43, 79-80.] Ernesto believed that Mr. Denny already knew that Ernesto was the shooter. [RTEH 45, 80.] Ernesto did not tell Mr. Yamamoto or his investigator, Mr. Sakamoto, that he actually committed the crime. [RTEH 44.] Before the hearing before Judge Pounders, Ernesto told two of his "homeboys" whose names he could not remember that he was the shooter. [RTEH 80-81.] Ernesto told no one else that he was the shooter.

[RTEH 80-81.]

Mr. Yamamoto testified at the hearing before Judge Pounders that, "after meeting with the petitioner in jail, he determined that the petitioner was not a percipient witness to the shooting. [RTEH 716.] Although no one ever told him directly, Mr. Yamamoto began to believe that Ernesto was the shooter. [RTEH 721.] Mr. Yamamoto developed the belief because, first, whenever he asked the petitioner who he thought the shooter was, the petitioner became very silent and, second, when he asked the petitioner's mother to find out the identity of the shooter, she said "I think I know, but it would be trading one for the other." [RTEH 722-723] Mr. Yamamoto never asked the petitioner if he wanted to mount a defense based on a theory that Ernesto was the actual shooter, but he assumed that the petitioner did not want to do this. [RTEH 793.] However, Mr. Yamamoto never instructed his investigator to stop investigating the identity of the actual shooter. [RTEH 1301.] Mr. Sakamoto, Mr. Yamamoto's investigator, also testified at the hearing before Judge Pounders. Mr. Sakamoto testified that Mr. Yamamoto never instructed him not to look for evidence which showed that Ernesto was the shooter. [RTEH 865.] No one contacted during the investigation ever told Mr. Sakamoto that Ernesto was the shooter. [RTEH 813, 860.] During his investigation, Mr. Sakamoto with Ernesto at Ham Park. (RTEH 808.]

Ernesto told Mr. Sakamoto that he was not at the park at the time of the shooting. [RTEH 811.] Ernesto never did or said anything to make Mr. Sakamoto believe that Ernesto was the shooter. [RTEH 830.] Mr. Sakamoto did not suspect that Ernesto was the shooter until after the petitioner's trial. [RTEH 812-183.]

Judge Pounders made the following relevant factual findings:

> c. No one contacted during the investigation told Mr. Sakamoto or Mr. Yamamoto that Ernesto Avila was the shooter.
>
> d. Ernesto Avila told Mr. Sakamoto that he was not at the park when the shooting started.
>
> e. The only persons Ernesto Avila told that he was the shooter were two homeboys whose names he could not remember.
>
> f. Ernesto Avila, Joanna Espinoza, and Elizabeth Luis agreed to get information on the other persons present during the shooting, but they never did.
>
> g. Petitioner never gave Mr. Sakamoto the names of any other witnesses.

[Answer to First Amended Petition, p. 59. Citations to record omitted.]

The petitioner contends that Mr. Yamamoto failed to

interview Ernesto and to seek to have Ernesto testify at the petitioner's trial and that these omissions constituted ineffective assistance of counsel.

While Mr. Yamamoto did not personally interview Ernesto, his investigator, Mr. Sakamoto, spoke to Ernesto during his investigation. [RTEH 808.] Ernesto told Mr. Sakamoto that he was not at the park at the time of the shooting. [RTEH 811.] No one ever told Mr. Yamamoto or Mr. Sakamoto before trial that Ernesto was the shooter. [RTEH 813, 860, 1251, 1302.] This court must accord a presumption of correctness to state court findings of fact. 28 U.S.C. § 2254 (e) (1). See Sumner v. Mata, 455 U.S. 591, 597, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982) (per curiam); Tinsley v. Borg, 895 F.2d 520, 524-525 (9th Cir. 1990). This presumption of correctness is equally applicable to a state appellate 'court's findings of fact. See Sumner v. Mata, 455 U.S. at 593; Tinsley v. Borg, 895 F.2d at 524-525. The California Court of Appeal adopted, Judge Pounders' findings. Thus, those findings are entitled to a presumption of correctness.

In light of these facts, Mr. Yamamoto had no reason personally to interview Ernesto or to have Ernesto testify at the petitioner's hearing. Criminal defense attorneys frequently deliberately refrain from personally interviewing witnesses and conducting investigations so as to avoid the possibility of

becoming a witness to a prior inconsistent statement. It was not beneath the standard of care expected of defense attorneys to rely upon an investigator to conduct witness interviews. Mr. Yamamoto's failure to interview Ernesto was mot outside the range of professionally competent assistance and, accordingly, did not constitute deficient performance. The petitioner has not shown that the state court's denial of claim 2 (b) wa: contrary to, or involved an unreasonable application of, clearly established federal law or was based on an unreasonable determination of the facts. The court should deny claim 2(b).

Claim 2(c)

The petitioner contends that Mr. Yamamoto's rendered ineffective assistance of counsel when he failed to ask Mr. Denny if Mr. Denny had any nonprivileged investigative material to pass on to Mr. Yamamoto. The nonprivileged material to which the petitioner refers appears to be the statements of Angela Espinoza and Marcella Riboni that Ernesto, Avila was the shooter. [First Amended Petition, p. 6.]

Mr. Yamamoto took over representation of the petitioner from Mr. Denny in the early stages of the case before the preliminary hearing. [RTEH 708.] Mr. Denny provided Mr. Yamamoto with a file containing only public documents. [RTEH 708.] Mr. Yamamoto was not concerned with this

because he thought "it was an early declaration of a conflict." [RTEH 712.] Mr. Yamamoto did not seek nonprivileged from Mr. Denny because the case was still at the preliminary hearing stage and Mr. Yamamoto did not think Mr. Denny would have much and Mr. Yamamoto wanted to conduct his own case based upon his own view of the facts. [RTEH 719.]

Mr. Yamamoto made a tactical decision not to seek nonprivileged materials from Mr. Denny. Mr. Yamamoto wanted to conduct his own case uninfluenced by the earlier work of Mr. Denny and he had time to do this. Tactical decisions that are not objectively unreasonable do not constitute ineffective assistance of counsel. See Hensley v. Crist, 67 F.3d 181, 184 (9th Cir. 1996); Morris v. California, 966 F.2d 448, 456 Cir. 1991) Mr. Yamamoto's desire to conduct his own case based upon his own view of the facts, uninfluenced by the investigation, thoughts and theories of Mr. Denny does not appear to be objectively unreasonable. In light of the fact that Mr. Yamamoto took over the representation of the petitioner during the early stages of the case it appears that and had ample time to conduct his own investigation, Mr. Yamamoto had no reason to believe that he would not discover anything already discovered by Mr. Denny. Thus, it appears that Mr. Yamamoto's decision not to seek nonprivileged materials from Mr. Denny was not objectively unreasonable and, accordingly, did not constitute

ineffective assistance of counsel.

Also, the petitioner has not demonstrated that Mr. Yamamoto's failure to seek nonprivileged materials from Mr. Denny resulted in prejudice to the petitioner. The statements of Angela Espinoza and, Riboni were the only relevant nonprivileged information which Mr. Denny possessed and Mr. Yamamoto would have received. As noted above in the discussion of claim 1, the petitioner has not shown that any credible evidence would have been discovered if Mr. Denny had provided Mr.Yamamoto with the statements of Angela Espinoza or Riboni. The court should deny claim 2 (c).

Claim 2 (d)

The petitioner contends that Mr. Yamamoto rendered ineffective assistance of counsel when he failed to request Ernesto Avila to waive the attorney-client privilege existing between Ernesto, on the one hand, and Mr. Denny and Mr. Denny's investigator, on the other hand, in circumstances in which Ernesto had confessed that he was the shooter.

As noted above, no one ever told Mr. Yamamoto or Mr. Sakamoto before trial that Ernesto was the shooter. Ernesto himself told Mr. Sakamoto that he was not at the park at the time of the shooting. [RTEH 811, 813, 860, 1251, 1302.] Neither Mr. Yamamoto nor his investigator, Mr. Sakamoto, had any evidence showing that Ernesto was the shooter. Furthermore, Mr. Yamamoto had no reason to believe that

Ernesto had confessed to Mr. Denny. At the time of trial, Mr. Yamamoto had no cause to request Ernesto to waive the attorney-client privilege. The petitioner has not shown that the state court's denial of claim 2(d) was contrary to, or involved an unreasonable application of, clearly established federal law or was based on an unreasonable determination of the facts. The court should deny claim 2(d).

Claim 2(e)

The petitioner contends that Mr. Yamamoto rendered ineffective assistance of counsel when he failed to interview and subpoena for trial Angela Espinoza who would have testified that Ernesto Avila and not the petitioner was the shooter.

Assuming arguendo that Mr. Yamamoto's failure to interview and subpoena Angela Espinoza constituted deficient performance, the present claim fails because petitioner has not demonstrated a reasonable probability that the result of the proceeding would have been different. At the evidentiary hearing, Angela Espinoza testified that she saw Ernesto fire three shots while running after the black males. [RTEH 162-163.] Angela also saw the petitioner on a little hill with her sister Joanna and Elizabeth Luis at the time of the shooting. [RTEH 164-165.] Angela was standing on a picnic bench when she made her observations. [RTEH 163.] Angela told Mr. Denny's investigator, Mr. Lynn, what she

saw. [RTEH 165-166.] Mr. Lynn told her that she knew too much and he did not want her to go to court. [RTEH 166-167.] Angela would have testified in court if she had been asked. [RTEH 166-167.] Angela signed a declaration dated October 28, 1992 in which she described the clothing of the shooter but did not identify Ernesto. [RTEH 170-173; Declaration of Nancy S Coan, Ex. G.]

Judge Pounders found the testimony of Angela Espinoza that she saw Ernesto shoot the victim not credible. [Answer to First Amended Petition, Ex. A, p. 61.] Judge Pounders noted that Angela Espinoza's sister, Joanna, was the mother of the petitioner's child and that Angela stated that she was standing on a picnic bench when she saw Ernesto do the shooting "not that far" away. [Answer to First Amended Petition Ex. A, p. 61-62.] However, Judge Pounders noted shooting was actually about 600 feet away. [Answer to First Amended Petition, Ex. A, p. 62.] Judge Pounder's personally observed the demeanor of Angela and found that her testimony that she saw Ernesto the victim was not credible. The credibility finding of Judge Pounders is entitled to a presumption of correctness. 28 U.S.C. § 2254 (e) (1). The petitioner has not overcome this presumption.

The result of the petitioner's trial would not have been different if Angela had testified that Ernesto was the shooter because she was not credible. The petitioner has not

demonstrated a reasonable probability that, but for Mr. Yamamoto's failure to interview and subpoena Angela Espinoza, the result of the petitioner's trial would have been different. The state court's rejection of the present claim does not involve an unreasonable application of federal law and is not based on an unreasonable determination of the facts. The court should deny claim 2(e).

Claim 2(f)

The petitioner contends that Mr. Yamamoto rendered ineffective assistance of counsel when he failed to interview and subpoena for trial witness Alice Dominguez who would have testified that she saw Ernesto Avila commit the shooting. Assuming arguendo that Mr. Yamamoto's failure to interview and subpoena Dominguez constituted deficient performance, the present claim fails because the petitioner has not demonstrated a reasonable probability that the result of the proceeding would have been different.

At the evidentiary hearing, Dominguez testified that she saw Ernesto chase a black man and shoot at him three times. [RTEH 504.] Dominguez saw the victim fall. [RTEH 505.] Dominguez made these observations "right there by the street, by the crack right there by the wall." [RTEH 503-504.)

Judge Pounders observed the demeanor of Dominguez and found her testimony that she saw Ernesto shoot the victim not credible. [Answer to First Amended Petition, Ex.

A, p. 61.] Judge Pounders noted that Dominguez saw the victim fall when even Ernesto testified that he did not see the victim fall. [Answer to First Amended Petition, Ex. A, p.161; RT 42, 503-505.] The credibility finding of Judge Pounders is entitled to a presumption of correctness. 28 U.S.C. sect 2254(e)(1). The petitioner has not overcome this presumption.

The result of the petitioner's trial would not have been different even if Mr. Yamamoto had called Dominguez to testify that Ernesto was the shooter because she was not a credible witness. The petitioner has not demonstrated a reasonable probability that, but for Mr. Yamamoto's failure to interview and subpoena Dominguez, the result of the proceeding would have been different. The state court's rejection of the present claim does not involve an unreasonable application of federal law and is not based on an unreasonable determination of the facts. The court should deny claim 2(f).

Claim 2 (i)

The petitioner contends that Mr. Yamamoto rendered ineffective assistance of counsel when he failed to conduct a thorough and diligent investigation to find witnesses to the shooting, including a failure by his investigator to follow-up telephone calls to teenage eyewitnesses who did not return telephone messages.

Counsel must conduct a reasonable investigation enabling him to make an informed decision about how best to represent his client. See Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir.1994). At the evidentiary hearing, Mr. Yamamoto testified that he did not put many limiting restrictions on Mr. Sakamoto's investigation. (RTEH 717.] Mr. Yamamoto told Mr. Sakamoto to see what he could find and to interview members of the Young Crowd gang to find witnesses. [RTEH 716, 717.] Mr. Yamamoto obtained pictures from the baby shower. [RTEH 726-727.] Mr. Yamamoto believed that most of the males at the baby shower would Mot make a good appearance at trial because they appeared to be gang members and Mr. Sakamoto was having trouble getting cooperation from them. [RTEH 726-728.]

Mr. Sakamoto testified that Mr. Yamamoto never instructed him not to look for evidence showing that Ernesto was the shooter. [RTEH 865.] Mr. Sakamoto testified that Mr. Yamamoto limited his investigation because "a lot of the stuff was superfluous to his part of the case, trying the case." [RTEH 805.] Mr. Sakamoto testified that Mr. Yamamoto did not ask Mr. Sakamoto to investigate all of the persons in the photographs from the baby shower. [RTEH 807.] During his meeting with Ernesto, Ernesto told Mr. Sakamoto that he was not at the park when the shooting took place. [RTEH 811.]

Ernesto told Mr. Sakamoto that he did not know who was at the park but would get the information. [RTEH 883.] Ernesto never gave Mr. Sakamoto the information and did not return Mr. Sakamoto's phone calls. [RTEH 1103.] Mr. Sakamoto testified that Joanna Espinoza and Elizabeth Luis also promised to give him the names of people at the park. [RTEH 835, 883.] Both Joanna Espinoza and Elizabeth Luis never gave Mr. Sakamoto the names. [RTEH 835-836, 883-884, 1103.]

Iasmin Luis testified that she took some photographs at the baby shower. [RTEH 228.] In one of the photographs, a man is flashing a gang sign. [RTEH 239.] Iasmin spoke to Mr. Yamamoto and he asked her to identify all the people she saw at the baby shower. [RTEH 228.]

Judge Pounders found that Ernesto, Joanna Espinoza and Elizabeth Luis agreed to get information concerning the other persons present during the shooting, but never did. [Answer to First Amended Petition, Ex. A, p. 60.] Judge Pounders found that Mr. Yamamoto did not try to identify all persons depicted in the photographs taken at the Baby Shower because of the difficulty in getting cooperation from some of the male witnesses and the fact that they would not be good witnesses. [Answer to First Amended Petition, Ex. A, p. 60.] They were throwing gang signs in the photographs. [Answer to First Amended Petition, Ex. A, p. 60.] He did, however,

ask Iasmin Luis, who took some of the photographs, to identify all of the people she was with at the Baby Shower. [Answer to First Amended Petition, Ex. A, p. 60.] Judge Pounders found that the new witnesses who testified at the evidentiary hearing were not available to Mr. Yamamoto due to the lack of cooperation of those contacted and the absence of a confession of guilt by Ernesto until more than two years after the trial. [Answer to First Amended Petition, Ex. A, p. 61.] Judge Pounders found that Mr. Yamamoto did not fail to investigate and produce potential witnesses to the shooting. [Answer to First Amended Petition, Ex. A, p. 59.]

The petitioner has not overcome the presumption of correctness given to the findings of Judge Pounders. In particular, the finding of Judge Pounders that the new witnesses were not available to Mr. Yamamoto due to the lack of cooperation is supported by Mr. Sakamoto's testimony that Ernesto, Joanna Espinoza and Elizabeth Luis never provided him with the names of witnesses as they had promised. In light of the testimony presented at the evidentiary hearing, the finding of Judge Pounders that Mr. Yamamoto did not fail to investigate and produce potential witnesses to the shooting is not contrary to, and does not involve, an unreasonable application of federal law and is not based on an unreasonable determination of the facts.

Furthermore, the petitioner has not demonstrated that an

investigation to find witnesses to the shooting would have resulted in credible, admissible evidence that Ernesto was the shooter. Judge Pounders found all of the testimony that Ernesto was the shooter not [Answer to First Amended Petition, Ex. A, p. 61-62.] The petitioner has not shown that the discovery of these witnesses would have created a reasonable probability that the result of the proceeding would have been different. The court should deny claim 2(i).

While some of Mr. Yamamoto's omissions may have constituted deficient performance, all of the petitioner's claims based upon Mr. Yamamoto's failure sufficiently to pursue a defense of third patty A culpability fail because the petitioner has not demonstrated that Mr. Yamamoto's omissions resulted in prejudice. Also, as Judge Pounders found, "due to consistent lack of cooperation from the immediate witnesses, [Mr. Yamamoto] never had access to admissible evidence, however credible, identifying the actual shooter as Ernesto Avila." [Answer to First Amended Petition, Ex. A, p. 65.] The petitioner has failed to demonstrate a reasonable probability that the result of the proceeding would have been different because, ultimately, all of the present claims are based upon testimony which Judge Pounders found to be not credible.

Claim 3:

At the petitioner's trial, Mr. Yamamoto presented a defense of alibi based upon witnesses who placed the petitioner at the other end of Ham Park at the time of the shooting. [RTEH 1216.] Mr. Yamamoto presented the testimony of witnesses Alfredo Sanchez, Estella "Blanca" Montoya, Elizabeth Luis and Iasmin Luis in support of the defense. [RTEH 1216.] Mr. Yamamoto believed that the evidence presented was sufficient to raise a reasonable doubt in the minds of the jury. [RTEH 1217.] The petitioner contends that Mr. Yamamoto was ineffective because he failed thoroughly to pursue an alibi defense. In particular, the petitioner contends that Mr. Yamamoto:

(a) failed to identify, locate and subpoena all of the 40 people in the park at the time of the shooting;

(b) failed to interview and subpoena Jose Padilla who could have that the petitioner was not the shooter because he saw the petitioner in another section of the park at the time when the shooting occurred;

(c) failed to interview and subpoena Ramona "Mona" Juarez who could have testified that the petitioner was not the shooter because she saw the petitioner in another section of the park at the time when the shooting occurred;

(d) failed to interview and subpoena Ramon Vasquez who could have testified that the petitioner was not the shooter because he saw the petitioner in another section of the

park at the time when the shooting occurred;

(e) failed to subpoena Joanna Espinoza who could have testified:

(1) that the petitioner was not the shooter because she saw the petitioner in another section of the park at the time when the shooting occurred;

(f) failed to interview and subpoena Rosa Luis who could have testified that Alice Dominguez stated immediately after the shooting that Ernesto Avila was the shooter; and

(g) presented a weak alibi witness at the trial by presenting the of Estella "Blanca" Montoya.

Claim 3(a)

The petitioner' contends that, in presenting an alibi defense, Mr. Yamamoto was ineffective because he failed to identify, locate and subpoena all of the 40 people in the park at the time of the shooting. The petitioner has specifically identified only five witnesses who would have presented testimony supporting the alibi defense in claims 3 (b), (c) , (d), (e) and (f). The court will discuss these claims below. The petitioner has not identified any of the remaining 35 people in the park at the time of the shooting. The petitioner has not specifically alleged what each of the 35 witnesses would have testified. Conclusory allegations that are not supported by specific facts do not merit habeas relief. See

James v. Borg, 24 F.3d 20, 26 (9th Cir. 1994) To the extent that the petitioner presents a claim based upon Mr. Yamamoto's failure to identify, locate and subpoena 35 unidentified people at the park, claim 3(a) is a conclusory allegation unsupported by specific facts. Claim 3(a) does not merit habeas relief The court should deny claim 3 (a)

Claims 3 (b) , (c) , (d) , (e) and (f)

The petitioner alleges in claims 3 (b) , (c) , (d) , (e) and (f) that Mr. Yamamoto failed to interview and/or subpoena Jose Padilla, Ramona Juarez, Ramon Vasquez, Joanna Espinoza and Rosa Luis, all of whom would have presented testimony showing that the petitioner was in another section of the park at the time of the shooting and was not the shooter. The petitioner contends that these omissions deprived him of the effective assistance of counsel.

At trial, Mr. Yamamoto presented the testimony of Alfredo Sanchez, Estella "Blanca" Montoya, Elizabeth Luis and Iasmin Luis to show that the petitioner was in another section of the park at the time of the shooting and was not the shooter. Mr. Yamamoto did not present any other testimony to that effect.[3/]

Judge Pounders made the following findings relevant to

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3. After the conclusion of the petitioner's trial, Mr. Yamamoto learned that Sanchez was a plaintiff in a civil lawsuit in which the petitioner was also a plaintiff. [RTEH 747.]

the present claims:

> j. Alfredo Sanchez was an independent and disinterested witness who corroborated those at the Baby Shower who placed petitioner in the vicinity of the barbecue, rather than the distant location of the shooting.
>
> k. the additional witnesses produced at the reference hearing were not available to the defense team due to the lack of cooperation of those contacted and the absence of a confession of guilt by Ernesto Avila until more than two years after the trial.
>
> l. The additional witnesses who placed petitioner in the barbecue area at the time of the shooting but could not see the shooter because of the hill and the great distance, would have presented cumulative evidence.

[Answer to First Amended Petition, Ex. A, p. 60-61. Citations to record omitted.]

Judge Pounders concluded, inter alia, that Mr. Yamamoto's "reliance on the independent testimony of Alfredo Sanchez, rather than other witnesses associated with the Young Crowd Gang, was a valid tactic." [Answer to First Amended Petition, Ex. A, p. 5.] As shown in the discussion of claim 2(i), Judge Pounders properly found that the

additional witnesses produced at the reference hearing were not available to the defense team due to the lack of cooperation of those contacted and the absence of a confession of guilt by Ernesto Avila until more than two years after the trial. This finding is supported by the record. Mr. Yamamoto's failure to interview and subpoena Jose Padilla, Ramona Juarez, Ramon Vasquez and Rosa Luis, is not outside the range of professionally competent assistance. The petitioner has Jailed to demonstrate that Mr. Yamamoto provided deficient performance.

Joanna Espinoza is the mother of the petitioner's child. [RTEH 1247.] Mr. Yamamoto knew that Joanna Espinoza was at Ham Park on the day of the shooting but did not subpoena her to testify. [RTEH 779-1282.] Mr. Yamamoto chose not the subpoena Joanna because he thought the jury would not give great weight to her testimony because of her relationship with the petitioner. [RTEH 1282-1283, Answer to First Amended Petition, Ex. A, p. 64.] Mr. Yamamoto also thought that Joanna Espinoza would not be cooperative because her relationship with the petitioner was somewhat strained. [RTEH 779, 1283.] When combined with the fact that Mr. Yamamoto presented four other witnesses whose testimony was similar to that to which Joanna would have testified, Mr. Yamamoto's tactical decision not to subpoena Joanna was not objectively unreasonable and does not

constitute ineffective assistance of counsel.

The petitioner has also failed to demonstrate prejudice as to claims 3 (b), (c), (d), (e) and (f). Jose Padilla, Ramona Juarez, Ramon Vasquez, Joanna Espinoza and Rosa Luis all would have presented testimony showing that the petitioner was in a different part of the park at the time of the shooting. At trial, Mr. Yamamoto presented testimony from Alfredo Sanchez, Blanca Montoya, Elizabeth Luis and Iasmin Luis to show that the petitioner was in another Section of the park at the time of the shooting and was not the shooter. The petitioner alleges that Padilla and Juarez were not members of the Young Crowd gang. Sanchez also was not a member of the Young Crowd gang. The record supports Judge Pounders's finding that the testimony of the additional witnesses, Padilla, Juarez, Vasquez, Joanna and Rosa, was cumulative. Counsel's failure to present cumulative testimony does not satisfy the prejudice requirement of a claim of ineffective assistance of counsel. See United States v. Schaflander, 743 F.2d 714, 719 (9th Cir. 1984); see also Babbitt v. Calderon, 151 F.3d 1170, 1174(9th Cir. 1998). The state court's rejection of claims 3(b), (c), (d), (e) and (f) did not involve an unreasonable application of federal law was not based on an unreasonable determination of the facts. The court should deny claims 3 (b) , (c) (d) , (e) and (f)

Claim 3(g)

The petitioner contends that Mr. Yamamoto presented a weak alibi witness at the trial by presenting the testimony of Estella "Blanca" Montoya. The petitioner contends that Montoya perjured herself when she testified that Ernesto was not at the park that day. The petitioner contends that Mr. Yamamoto should not have called a witness who would lie under oath. The petitioner contends that the presentation of Montoya's testimony constituted ineffective assistance of counsel.

The petitioner has not shown, that Mr. Yamamoto knew or should have known that Montoya would perjure herself regarding Ernesto's presence at Ham Park. The petitioner has not shown that use of Montoya as a witness was outside the range of professionally competent assistance. The petitioner has not demonstrated that Mr. Yamamoto's performance was deficient or that it resulted in prejudice. The court should deny claim 3(g).

Claim 4:

The petitioner contends that Mr. Yamamoto was ineffective because he failed to discover evidence which would have impeached certain prosecution witnesses. In particular, trial counsel:

(a) failed to investigate the criminal background of prosecution witnesses Demetrius Kidd and Romel Johnson, one of whom was on probation and one of whom may have

been on probation at the time of the trial;

(b) failed to pursue and present evidence regarding the gang affiliations of prosecution witnesses Demetrius Kidd and Teavious Whatley which would have tended to impeach testimony of prosecution witnesses who denied engaging in spray painting a wall with gang graffiti immediately before the shooting;

(c) failed to interview and present witness Travon Towner whose testimony would have undermined the reliability of the observations of prosecution witnesses Demetrius Kidd and Romel Johnson by showing that ,both were running away from, and did not look back at, the shooter;

(d) failed to investigate and discover evidence that, within a day or two after the shooting, a city painting crew painted over graffiti placed on the park wall by the prosecution witnesses;

(e) failed to investigate evidence of possibly suggestive identification procedures used by the police with prosecution witnesses who identified the petitioner as the shooter;

(f) failed to consult with or seek funds for presenting the testimony of an eyewitness identification expert; and

(h) failed to impeach details in the testimony of prosecution witness Romel Johnson.

Claim 4(a)

The petitioner contends that Mr. Yamamoto failed to investigate the criminal background of prosecution witnesses Demetrius Kidd and Romel Johnson, one of whom was on probation and one of whom may have been on probation at the time of the trial. Kidd testified at the hearing before Judge Pounders. Kidd testified that he was on probation at the time of the petitioner's trial but that this did not affect his trial testimony. [RTEH 1135.] Johnson also testified at the evidentiary hearing. Johnson testified that he was not sure if he was on probation at the time of the petitioner's trial. [RTEH 907.]

Greta Walker was the prosecutor who tried the petitioner's jury trial. [RTEH 1020.] Ms. Walker testified at the evidentiary hearing. Ms. Walker testified that she provided Mr. Yamamoto with everything she had regarding the petitioner's case. [RTEH 1020.] Ms. Walker testified that she did not offer to help Kidd with his probation. [RTEH 51049.]

Mr. Yamamoto testified at the evidentiary hearing that he filed a motion for discovery in the petitioner's case. [RTEH 764-765.] Mr.Yamamoto testified that he did not attempt to determine whether Kidd or Johnson had any criminal cases pending or were on probation during the petitioner's trial. [RTEH 751.]

Judge Pounders made the following relevant findings:

2. MR. YAMAMOTO DID NOT FAIL TO DISCOVER FAVORABLE EVIDENCE.

. . . .

d. Demetrius Kidd was on juvenile probation at the time of trial. Romel Johnson may have been on juvenile probation. Mr. Yamamoto filed a formal discovery motion for criminal history information. Trial prosecutor Greta Walker provided everything she had. She never offered to help Mr. Kidd with his probation matter. Further discovery would not have led to admissible impeachment.

[Answer to First Amended Petition, Ex. A, p. 62-63. Citations to record omitted.]

The record supports Judge Pounders' factual findings. Judge Pounders, findings that Mr. Yamamoto did not fail to discover favorable evidence and that further discovery would not have led to admissible impeachment are findings that Mr. Yamamoto did not provide deficient performance and that no prejudice resulted. This court cannot say that either of these findings involved an unreasonable application of federal law or are based on an unreasonable determination of the facts. The court should deny claim 4(a).

Claim 4(b)

The petitioner contends that Mr. Yamamoto failed to

pursue and present evidence regarding the gang affiliations of prosecution witnesses Demetrius Kidd and Teavious Whatley which would have tended to impeach testimony of prosecution witnesses who denied engaging in spray painting a wall with gang graffiti immediately before the shooting.

At the evidentiary hearing, Mr. Yamamoto testified that he did not attempt to determine whether Kidd or Johnson were gang members or whether they had spray-painted gang graffiti on the wall at Ham Park because he did not think it was important. [RTEH 749-750.]

Judge Pounders found that Kidd and Whatley were gang members. Judge Pounders continued,

> This information would have provided some support for the trial testimony that the victims had been writing on the wall. The issue was not critical, the graffiti being apparently the cause of the altercation, but it was not a justification for the shooting. Gang affiliations came out in the cross-examination of petitioner at trial. The defense decision not to emphasize gang affiliation was a valid trial tactic.

[Answer to First Amended Petition, Ex. A, p. 62. Citations to record omitted.]

The court need not determine the actual reasons for counsel's acts or omissions, so long as the acts and omissions fall within the range of reasonable representation. See Morris

v. State of California, 966 F.2d at 456-457. The gang affiliations of Kidd and Johnson had very limited relevance here. Although the gang evidence may have supported the defense version of facts regarding the graffiti, presentation of the evidence may have appeared to be an unfair attack on the characters of the crime victims. Mr. Yamamoto could have reasonably believed that the introduction of the gang affiliation of the victims into the trial would have negatively affected the jury. Judge Pounders found that Mr. Yamamoto's decision not to emphasize gang affiliation was a valid trial tactic. The state court's rejection of the present claim does not involve an unreasonable application of federal law and is not based on an unreasonable determination of the facts. The court should deny 4(b).

Claim 4 (c)

The petitioner contends that Mr. Yamamoto failed to interview and present witness Travon Towner whose testimony would have undermined the reliability of the observations of prosecution witnesses Demetrius Kidd and Romel Johnson by showing that both were running away from, and did not look back at, the shooter.

At the evidentiary hearing, Towner testified that he was at Ham Park with Kidd, Johnson and Darryl Ferguson. Towner testified that he away with Kidd and Johnson from the fight with the Young Crowd group. [RTEH 611-614.]

Towner testified that he did not see either Kidd or Johnson look in the direction of the shooter. [RTEH 613-614.] Towner saw Kidd fall. [RTEH 614.]

Kidd testified at the evidentiary hearing that he and some friends entered Ham Park on the day of the shooting. [RTEH 1136.] Kidd was the victim of the shooting. Kidd was shot in the left side of the head and remained in the hospital for two months. [RTEH 1127-1128.] Kidd testified that a group of Latinos approached his group. [RTEH 1136.] The petitioner was in this group and showed his tattoos to Kidd. [RTEH 1136.] Later, a large group of Latinos surrounded Kidd's group. [RTEH 1137.] Kidd ran away and was shot as he ran. [RTEH 1137.] Kidd testified that he turned and looked at the shooter but did not get a real good look. [RTEH 1138.] Kidd identified the petitioner as the shooter at the scene on the day of the shooting and at the petitioner's trial. [RTEH 1128-1129.] Kidd was certain of his trial testimony at the time of that testimony. [RTEH 1129.] However, at the evidentiary hearing, Kidd testified that he was no longer sure that the petitioner was the shooter. [RTEH 1129-1131.]

Johnson testified at the evidentiary hearing. Johnson testified that on the day of the shooting, prior to the shooting, he had a conversation with the petitioner. [RTEH 899-900.] The petitioner showed Johnson the tattoos on one ear and

back. [RTEH 900.] Later, there was a fight and then a shooting. [RTEH 901-902.] Johnson testified that he, Kidd and Towner were running out of the park when he looked back and saw the petitioner shooting at them. [RTEH 902-903.] Johnson testified that he was sure that the petitioner was the man who shot Kidd. [RTEH 898-899.] Johnson also testified that Ernesto was not the man he saw shoot Kidd. [RTEH 898-899.]

Judge Pounders provided a brief summary of, but made no specific findings regarding, the testimony of Towner. [Answer to First Amended Petition, Ex. A, p. 58.] However, Judge Pounders noted that Johnson was an "exceptionally persuasive witness" and that Johnson's testimony was an obstacle [Mr. Yamamoto] could not overcome". [Answer to First Amended Petition, Ex. A, p. 63, 65.] It appears that Judge Pounders that Towner's testimony would not have created a reasonable probability of a different result because of the strength of Johnson's testimony.[4] The state court's rejection of claim 4(c) does not involve an unreasonable application of federal law and was not based on an unreasonable determination of the facts. The court should deny claim 4(c).

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4. The court also notes that Kidd's post-trial doubts about this identification of the petitioner do not affect the strength of his testimony at trial.

Claim 4 (d)

The petitioner contends that Mr. Yamamoto failed to investigate and discover evidence that, within a day or two after the shooting, a city painting crew painted over graffiti placed on the park wall by the prosecution witnesses. The petitioner contends that this would have bolstered the credibility of defense witnesses who testified that the victims spray painted a wall.

At the evidentiary hearing, a Lynwood city employee testified that, around the time of the shooting, anti-graffiti city paint crews checked Ham Park for graffiti on a daily basis. [RTEH 555.] Two days after the shooting, a city paint crew painted over graffiti on the wall at Ham Park. [RTEH 546-548.] The wall had "YC" and "S/S 36" graffiti on it. [RTEH 555-556.]

Judge Pounders made the following findings relevant to the present claim:

> 2. MR. YAMAMOTO DID NOT FAIL TO DISCOVER FAVORABLE EVIDENCE.
>
> a. Graffiti sprayed on the park wall on August 19, 1990, would have been removed by the Lynwood Graffiti Program on the 19th or the 20th, but no such record exists.
>
> b. The record of graffiti removal for August 21,

> 1990, does not corroborate defense witnesses that Crip gang graffiti was sprayed.
>
> c. Of the five black teenagers who were involved in the altercation, two were gang members. Teavious Whatley was a member of the Rolling 60s. Mr. Kidd was apparently a member of the Block Crip Gang. This information would have provided some support for the trial testimony that the victims had been writing on the wall. The issue was not critical, the graffiti being apparently the cause of the altercation, but it was not a justification for the shooting. . . .

[Answer to First Amended Petition, Ex. A, p. 62. Citations to record omitted.]

The factual findings of Judge Pounders are supported by the record. Judge Pounders found that the record of graffiti removal did not corroborate the claim of defense witnesses that Crip gang graffiti was painted on the wall.[5/] Judge Pounders found that the failure of Mr. Yamamoto to present evidence of graffiti on the wall did not create a reasonable probability that the result of the trial would have been

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5. The "YC" graffiti appears to be Young Crowd graffiti. The "S/S 36" graffiti appears to be South Side 36th graffiti. [RTEH 551.] Kidd was a member of the Lennox Block Crips, and Teavious Whatley was a member of the Rolling 60s gang. No one involved in this case appears to be related to South Side 36th.

different. The state court's rejection of claim 4(d) did not involve an unreasonable application of federal law and was not based on an unreasonable determination of the facts. The court should deny claim 4(d).

Claim 4(e)

The petitioner contends that Mr. Yamamoto failed to investigate evidence of possibly suggestive identification procedures used by the police with prosecution witnesses who identified the petitioner as the shooter. The petitioner contends that the in-field showup, identification was improper because: (1) only the petitioner was taken to Kidd's location, while another detainee remained in the police car; (2) the police did not conduct separate showups for each of the witnesses, Kidd and Johnson; (3) the police officers did not admonish the witnesses prior to the showup; and (4) while Kidd was waiting on a stretcher after the shooting, he heard police radio broadcasts stating that the police had arrested someone in connection to the shooting.

Judge Pounders found, "the broadcast procedures employed by the sheriff's deputies at the in-field identification were not suggestive." [Answer to First Amended Petition, Ex. A, p. 63.] Judge Pounders made no findings regarding the petitioner's other contentions.

Identification testimony is inadmissible as a violation of due process whenever: (1) a pre-trial encounter is so

impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification; and (2) the identification is not sufficiently reliable to outweigh the corrupting effects of the suggestive procedure. Van Pilon v. Reed, 799 F.2d 1332, 1338 (9th Cir. 1986) citing Simmons v. United States, 390 U.S. 377, 384, 88 S.CT. 967, 19 L.Ed.2d 1247 (1968) and Manson v. Brathwaite, 432 U.S. 98, 114, 97 S.Ct. 2243, 564 L.Ed.2d 140 (1977). When a witness identifies a defendant under suggestive circumstances, the trial court should consider the following five factors to determine whether the identification was reliable: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated at the [pretrial] confrontation; and (5) the time between the crime and the [pretrial] confrontation. Manson v. Brathwaite, 432 U.S. at 114; Neil v. Biggers, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972) Reliability "is the linchpin in determining the admissibility of identification testimony." Manson v. Brathwaite, 432 U.S. at 114.

While the circumstances of the one-man in-field showup appear to be suggestive, the fact that only one suspect was presented for identification does not make the identification procedure invalid. United States v. Jones, 84 F.3d 1206,

1210 (9th Cir. 1996). Unless the procedure gives rise to a very substantial likelihood of irreparable misidentification, the identification evidence may be presented to the jury to weigh. Id.

The present claim nonetheless fails because the reliability factors noted above direct a conclusion that the identifications of Kidd and Johnson were reliable at the time of trial.[6] Both witnesses had opportunity to view the petitioner as he shot at them, paid to the shooter and were certain of their identifications at the showup and at trial. Although, Kidd's description of the clothing of the petitioner differed from the clothes he wore that day, this inaccuracy was outweighed by the other factors. Johnson's description was accurate. Thus, even if Mr. Yamamoto had investigated the possible suggestiveness of the in-field showup identification of the petitioner, that evidence would have been admitted. The state court's rejection of claim 4(e) did not involve an unreasonable application of federal law. The court should reject claim 4(e).

---

6. Kidd was certain of his identification of the petitioner until shortly before the evidentiary hearing, long after petitioner's trial. [RT 68; RTEH 1129-1131.] The court must judge the reasonableness of counsel's conduct "on the facts of the particular case, viewed as of the time of counsel's conduct. Strickland, 466 U.S. at 690.

Claim 4(f)

The petitioner contends that Mr. Yamamoto failed to consult with or seek funds for presenting the testimony of an eyewitness identification expert. The petitioner has not suggested what an eyewitness identification expert would have stated at trial. The petitioner has not shown that eyewitness identification expert would have created any doubt in the identification testimony of Kidd or Johnson. As such, the petitioner has stated only conclusory allegations unsupported by specific facts. See James v. Borg, 24 F. 3d at 26. The court should deny claim 4(f).

Claim 4(h)

The petitioner contends that Mr. Yamamoto failed to impeach details in the testimony of prosecution witness Romel Johnson. The petitioner contends that Johnson's testimony was suspect in the following respects: Johnson was inconsistent as to when and whether he first saw the petitioner holding a gun; Johnson stated at trial that three men chased his group but stated at the evidentiary hearing that only one man chased his group; Johnson stated that he identified the petitioner in a line-up at the jail when there was no such line-up; and Johnson testified at the evidentiary hearing that the petitioner's hair was different at the time of the shooting but it was not.

The petitioner also contends that Johnson stated at the

evidentiary hearing that he "did not actually know who fired the shot that cause Mr. Kidd to fall down." While this statement is factually correct, it is misleading. Johnson testified that he saw the petitioner with a gun chasing Johnson's group. Then, Johnson turned away to run, heard a shot and saw Kidd fall.

Johnson testified at the evidentiary hearing. Judge Pounders, noted that Johnson was a reluctant witness and that Johnson "indicated that he did not remember the incident because it was a long time ago". [Answer to First Amended Petition, Ex. A, p. 58.] Judge Pounders made the following relevant findings:

> 3. MR. YAMAMOTO DID NOT FAIL TO IMPEACH ROMEL JOHNSON.
>
> a. The testimony of Deputy Gittisarn at the hearing as to whether Mr. Johnson identified petitioner as the Hispanic who threatened him in the park was substantially the same as Mr. Johnson's trial testimony.
>
> b. There is no inconsistency between Mr. Johnson's description of petitioner's securing the handgun by "creeping" away to the fence and his description of petitioner drawing the gun from his waistband during the chase. The deputy taking the report did not ask him about how the gun was

acquired.

c. Romel Johnson was an exceptionally persuasive witness. [Answer to First Amended Petition, Ex. A, p. 63.]

All of Johnson's inconsistencies appear to be a result of the time elapsed between the trial and the evidentiary hearing. Also, all of the inconsistencies concern minor details. Judge Pounders had the opportunity personally observe the demeanor of Johnson. The petitioner has not overcome the presumption of correctness given to Judge Pounders, finding. The state court's rejection of the present claim is not based on an unreasonable determination of the facts. The court should deny claim 4(h).

Claim 5

In claim 5, the petitioner claims that he is entitled to a new trial because of newly discovered exculpatory evidence in attorney Denny's file that Ernesto Avila was the actual shooter. The petitioner has withdrawn the three specific unexhausted factual allegations which he originally asserted in claims 5 (a), 5 (b) and 5 (c) As currently alleged, (with claims 5 (a), 5 (b) and 5 (c) deleted), the petitioner has only stated conclusory allegations unsupported by facts (See James v. Borg, 24 F.3d at 26) or claims which have already been discussed above. The court should deny claim 5.

RECOMMENDATION

In the light of the foregoing, the magistrate judge recommends that the court issue an Order: (1) approving and adopting the Third report and Recommendation; and (2) directing that judgment be entered dismissing the petition on the merits with prejudice.

DATED: May 12 2000

/S/
JAMES W. McMAHON
United States Magistrate Judge

APPENDIX H

RECEIVED FEB 28 1994

SO35747

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

In Re JESUS AVILA On Habeas Corpus

SUPREME COURT
F I L E D
FEB 24 1994
Robert Wandruff Clerk

DEPUTY

Petition for writ of habeas corpus DENIED.

Mosk, J. is of the opinion an order to show cause should issue.

/S/

Chief Justice

APPENDIX I

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

COURT OF APPEAL - SECOND DIST.
F I L E D
SEP - 7 1993
JOSEPH A. LANE Clerk
GUZMAN
Deputy Clerk

In re	No. B071117
JESUS AVILA	(Super. Ct. No. TA008385)
On Habeas Corpus.	(Cary H. Nishimoto, Judge)
	ORDER

THE COURT*:

On February 23, 1993 this court referenced this matter to the Los Angeles County Superior Court for the taking of evidence relating to petitioner Avila's allegations he was denied the right to effective assistance of counsel during his trial in Los Angeles County Superior Court case number TA008385, and for findings of fact responsive to those allegations.

The report of the referee (Superior Court Judge William R. Pounders), containing his findings of fact and including

/S/ /S/ /S/
*LILLIE, P.J., JOHNSON, J., WOODS (Fred), J.

transcripts of proceedings conducted from June 18, 1993 to

July 30, 1993 (eleven volumes) was submitted and filed herein September 1, 1993.

In his report, the referee concluded petitioner Avila was afforded effective assistance of counsel during his trial. This court has read and considered the referee's report, and has examined the transcripts of the proceedings. We hereby adopt the referee's findings responsive to the allegations contained in the captioned petition. The petition is denied.

APPENDIX J

ORIGINAL

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

COURT OF APPEAL - SECOND DIST.
FILED
SEP 1 1993
JOSEPH A. LANE CLERK
Deputy Clerk

In re	)	No. B071117
	)	
JESUS AVILA,	)	(Super. Ct. No. TA008385)
	)	
On Habeas Corpus	)	REFEREE'S REPORT
	)	

Following an evidentiary hearing over the course of ten days during which 23 witnesses testified, the referee submits these findings of fact concerning "allegations of ineffective assistance of counsel at the time of trial." Appearing on behalf of the petitioner were Barry Levin and Nancy Coan. Appearing for Real Party in Interest was Deputy District Attorney Eleanor Barrett.

SUMMARY OF THE TESTIMONY

ERNESTO AVILA, age 24, testified that he is petitioner's brother, that he was at a picnic in Ham Park in Lynwood on August 19, 1990, and that members of the Young Crowd Latino Street Gang, including himself and his brother, talked to three teenage male blacks who came into

the Park. (RT 20, 28-29) He showed them his tattoos and walked away. (RT 30) The three males left and returned 10 to 15 minutes later with two more, who went over to a brick wall and sprayed Crip gang graffiti. (RT 31-33) Five or six Young Crowders approached them, and a fight started. (RT 34-35)

Ernesto Avila was the individual who chased three black males across the park and fired a couple of shots at them from a handgun retrieved from his pocket. (RT 41) He did not see anyone fall. (RT 42) Mr. Avila talked to George Denny along with investigator David Lynn, thinking that Mr. Denny was to represent petitioner, and does not remember telling them that he actually committed the crime. (RT 43-44) It appeared to Mr . Avila that Mr. Denny already knew of his involvement. (RT 45) He did not tell trial counsel Ted Yamamoto or his investigator, Kazuo Sakamoto, that he committed the crime. (RT 44) The only persons Mr. Avila told that he was the shooter were homeboys whose names he could not remember. (RT 80)

GEORGE DENNY III, an attorney for 34 years, testified that he represented petitioner from about late August to early October. (RT 116) Mr. Denny declared a conflict when he learned from his investigator, Mr. Lynn, and then from Ernesto Avila that Ernesto had committed the crime.

(RT 118) Mr. Denny did not remember Ernesto's specific words and there was some "circumlocution" before it was made very clear that Ernesto was confessing to the shooting. (RT 152) Mr. Denny was representing Ernesto Avila on a criminal case which had not concluded by August 1990. (RT 126-127; 1 RT 46)

Investigator DAVID LYNN testified that he had a personal relationship with many of the kids from the Young Crowd Gang and that Ernesto Avila told him that he was the shooter. (3 RT 387, 404) Mr. Lynn talked to, but did not interview, Angela Espinoza, who mentioned that she saw the shooter and he was Ernesto Avila. He did not record the conversation. (3 RT 401-402) He interviewed petitioner, Joanna Espinoza, and Rosie Luis. After he left the case, he came across Alf redo Sanchez, who lived two or three houses from Ham Park and said he saw petitioner getting down on the ground with his girlfriend Joanna when the shooting happened. (3 RT 398-399)

TED YAMAMOTO became trial counsel for petitioner on October 22, 1990. (4 RT 707) He has been practicing criminal law, including death penalty cases, for almost 20 years. (4 RT 780-781) Mr. Denny only vaguely indicated that the nature of the conflict was that he was representing in another matter someone he feels might have been the shooter.

(4 RT 709-710) He did not inquire into the conflict because the public defender's office never tells 987 attorneys. (7 RT 1224)

Mr. Yamamoto received the file without any investigative material and did not ask whether there had been an investigation. (4 RT 712, 715) Mr. Sakamoto, with whom Mr. Yamamoto had worked before, was appointed as the investigator. (4 RT 715-716) Mr. Yamamoto did not put too many limiting restrictions on what the investigator should do, telling him to see what he could find. (4 RT 717)

Mr. Yamamoto got the impression that Ernesto Avila was the shooter when he asked petitioner who might be the shooter and petitioner "would always just get silent." (4 RT 723-724) Petitioner never indicated that Mr. Yamamoto should not produce evidence pointing to Ernesto as the shooter. (4 RT 724) Mr. Yamamoto felt obliged to go along with what he thought was his client's sentiments that he not necessarily go after petitioner's brother. (4 RT 752) At a pretrial hearing, Mr. Yamamoto asked petitioner's mother to ask around the neighborhood to find who did the shooting. Looking dejected, she said, "I think I know, but it would be trading one for the other." (4 RT 722-723)

Mr. Yamamoto obtained pictures of the individuals present at the baby shower. From their appearance as well as his investigator's difficulty in getting cooperation from some

of the male prospective witnesses, he felt that they would not be good witnesses. (4 RT -727) He did not try to identify each person in the photograph because he felt it was not necessary and he did not necessarily want to identify some of the people, apparently as gang members. (4 RT 735)

Mr. Yamamoto interviewed TERRI CLARK but did not recall whether, as at the instant hearing, she identified Ernesto Avila as the shooter. (4 RT 731-732; 3 RT 567-568; 7 RT 1248) He chose not to use her testimony for a number of reasons, including that it was cumulative and that she might create a negative impression on the jury due to her demeanor, manner of speech, and appearance. (4 RT 732-733; 7 RT 1218)

Mr. Yamamoto presented the defense of alibi, that petitioner was at the other end of a large park when the shooting took place. He did not try to show who the shooter actually was for several reasons. First, he did not feel it was necessary. Second, he did not feel that it would help the case at all. Third, there was some indication from his investigator that he was not getting enough cooperation. Fourth he felt that Alfredo Sanchez, being an independent and disinterested witness, would raise a reasonable doubt. (4 RT 741-743, 758) The other witnesses were Blanca Montoya, Elizabeth Luis, and Iasmin Luis. (7 RT 1216) He had no witness who would testify that someone else did the shooting. (7 RT 1251;

8 RT 1302)

Mr. Yamamoto felt that the victims were mistaken in their identifications. (7 RT 1220) At trial, he focused on the ability of Demetrius Kidd and Romel Johnson to observe and remember the events accurately. (7 RT 1222)

Mr. Yamamoto did not try to show that the victims were members of a gang or that the wall in the park had been freshly painted. He did not try to determine whether the victims had pending cases. (4 RT 748-751) He feels that he fell below the minimum standard of competence with respect to providing petitioner with a zealous representation because he probably should have excused himself when he felt he was being restrained about revealing Ernesto Avila's possible involvement. (4 RT 781)

KAZUO SAKAMOTO, an investigator on criminal cases since 1986, had retired after ten years with the Oxnard Police Department serving in patrol, narcotics, and vice. (5 RT 803-804) On November 26, 1990, he was appointed on this case. (5 RT 873) He was told to read the reports, talk to the client, and check the scene. (5 RT 871) Mr. Yamamoto never told him in any way not to look for evidence that Ernesto Avila was the shooter in this case. (5 RT 865)

Mr. Sakamoto met with petitioner within a week after he got the case. Petitioner stated that he had been with

codefendant Nieves and the two girls who helped pack the cars after the shooting. (5 RT 854-855) Petitioner never gave him any other names of witnesses. He asked that Mr. Sakamoto check with his sisters Francesca and Joanna, who in turn would contact his brother, Ernesto. (5 RT 856; 6 RT 1075)

No one contacted during the investigation ever told Mr. Sakamoto that Ernesto was the shooter and petitioner was not. (5 RT 813, 860) Ernesto Avila told Mr. Sakamoto that he was not at the park when the shooting took place. (5 RT 8 11) He never indicated or said anything to make Mr. Sakamoto believe that he was the shooter. (5 RT 830) He said he did not know any people that were at the park, but he said he would get the information. (5 RT 883) Ernesto gave him no information and did not return calls. (6 RT 1103)

Joanna Espinoza and Elizabeth Luis were supposed to get information on the persons present during the shooting, but they never did. (5 RT 834-836, 839, 883, 886) Joanna was uncooperative at times, and she did not know the names of any other witnesses to the shooting. (6 RT 1114-11.15) A return visit to get more information from Ernesto and Christina Avila also failed. (5 RT 834, 849)

Mr. Sakamoto interviewed petitioner on November 27, 1990, Joanna Espinoza on January 8, 1991, Blanca Montoya on January 22, and both Terri Clark and Elizabeth Luis on

February 19, 1991. He interviewed Alfredo Sanchez on February 20, 1991. (6 RT 1072-1075) Ms. Clark did not tell him that Ernesto was the shooter. (6 RT 1099-1101)

Mr. Sakamoto spent about 88 hours on the case prior to trial. (6 RT 1093-1094) Hardly anything was done before the beginning of the case because Mr. Sakamoto was very busy and the attorney directed him in other directions. He had 14 or 15 other cases with counsel. (6 RT 1074-1075) He spent many hours in conference with the attorney. (6 RT 1078-1089) He told counsel that the witnesses in this case were uncooperative. (6 RT 1101-1102)

Mr. Sakamoto was paid $2,500 at $20 per hour for his 135 hours of investigation, and he visited Ham Park at least five times. (5 RT 833, 874-875; 6 RT 1093) He was paid for another 20 hours of investigation after the trial concluded. (5 RT 876)

DEPUTY NIELS GITTISARN assigned to Lynwood Station Patrol was flagged down by Romel Johnson. (7 RT 1153, 1166) His information about the shooter with tattoos led to the initial broadcast. (7 RT 1166) Mr. Kidd did not identify the shooter in his presence. (7 RT 1169)

DEPUTY GARY ALLEN transported petitioner to the victim's location in a backyard where he was on a gurney

awaiting an ambulance. The victim said that was the person who shot him. (9 RT 1398, 1401)

ESTELLA MONTOYA, who had three daughters by petitioner's brother and had lived with him since 1988, testified that Ernesto never told her he was the shooter. (9 RT 1449-1452) She had testified at petitioner's trial that Ernesto was not at the park on the day of the shooting. (9 RT 1456).

JOANNA ESPINOZA, age 18 and the mother of petitioner's 4year-old child, estimated that about 30 boys and girls attended the Baby Shower for Elizabeth Luis at Ham Park. (2 RT 247-248) At the time the gunshots were heard, petitioner was with her in the barbecue area. (2 RT 250-251) She did not see who fired the shots. (2 RT 252) Three days after the event, she asked Ernesto why he did it, and he said he got tired of running. (2 RT 253) She briefly told Mr. Yamamoto what she knew, but when he called her to testify, she said she could not go to court unless she was subpoenaed. (2 RT 256, 260)

ANGELA ESPINOZA, Joanna's 16-year-old sister, testified that she saw Ernesto fire the three shots while running after the black guys. She was standing on the picnic bench to make the observations. (1 RT 155, 162-163) She

told investigator Lynn, who said that she knew too much. (1 RT 165-166) In the declaration she gave for this hearing, she did not identify the shooter. (1 RT 170-172)

JOSE PADILLA, age 22, had met petitioner three years ago and was the cook for the Baby Shower. He went with his girlfriend, Mona Juarez. He was not a gang banger. (2 RT 290-291) When the Carne Asada he was cooking was almost finished, he saw the fight. (2 RT 292-293) When the shots were fired, he could not see who was, shooting because of the hill between him and the baseball diamond, but petitioner was about 20 feet away. (2 RT 296-297)

RAMONA JUAREZ, a 24-year-old nursing student, set up the Baby Shower for her friend Elizabeth. (2 RT 322) She was in charge of the games in the barbecue pit area and had taken some pictures while the party was in progress. (2 RT 323-324) Petitioner was her friend. (2 RT 325) At the time the gunshots were fired, he was about 15 feet away in the barbecue pit area. (2 RT 328)

RAMON VASQUEZ, who had known petitioner for six years and was in the Young Crowd Gang with him, put up the decorations and provided things for the party. (2 RT 349-350) Unable to see who did the shooting "way on the other side of

the park, he saw petitioner about ten feet away. (2 RT 355) At the time of trial, Mr. Vasquez had outstanding warrants for his arrest. (2 RT 380)

ALICE DOMINGUEZ, age 20, had been invited to the shower by Elizabeth and had met petitioner a couple of times. (3 RT 499) She saw Ernesto show his tattoos to the male blacks and then they just started fighting. She saw him chase one black guy and shoot at him three times. (3 RT 504) From the area of the wall, she saw the victim fall. (3 RT 503-505) Petitioner was standing with his girlfriend, Joanna, in the barbecue area. (3 RT 506) She told Mr. Yamamoto what she had seen. (3 RT 509)

TERRI CLARK, age 23, had grown up with petitioner. (3 RT 562-563) She testified that she saw Ernesto Avila chasing the black guys across the baseball field and shooting at them. Petitioner was in the barbecue area with Joanna. (3 RT 567-568) She talked to Mr. Yamamoto and showed up to testify, but he did not use her because of the way she was dressed. (3 RT 572-573)

MARCELLA RIBONI, age 23 and petitioner's cousin, attended the Baby Shower. (4 RT 642-643) From on top of a bench, she saw Ernesto chasing one of the black guys and

shooting the gun. Petitioner was on top of Joanna on the ground. (4 RT 648) She told this to investigator Lynn, who said he was going to keep her out of it. (4 RT 651) She did not contact anyone in authority because she would be favoring one cousin over the other. (4 RT 659-660)

ROSA LUIS, who grew up with petitioner and lived with codefendant Jose Nieves, was at the shuffle board area with Nieves when she heard the gunshots. (4 RT 666, 683, 674) Moving to the hill straight across from them, she asked Alice Dominguez what happened, and she pointed out Ernesto as the shooter. (4 RT 674-676) Mr. Nieves was arrested and pled guilty to assault. (4 RT 688-689)

IASMIN LUIS took photographs at the park. Some of the men were "flashing out Young Crowd" with hand gestures. (2 RT 239) Mr. Yamamoto asked her to identify all the people she saw at the Baby Shower that day. (2 RT 228)

STANLEY GRAYER, the Anti-Graffiti Program Manager for the City of Lynwood, testified that the Daily Work Order for August 21, 1990, recorded the painting over of graffiti on the wall in Ham Park by the crew that day. The wall had "YC" and "S/S 36th" graffiti at that time. (3 RT 546-548; Petn. Exh. J)

DEMETRIUS KIDD was shot in the head on August 19, 1990, and was in the hospital for two months. He identified petitioner as the shooter at the scene and at trial. (6 RT 1127-1129) He was sure of the identification until a couple of days before the instant hearing. (6 RT 1129) He was in custody, and his testimony caused him to miss his parole hearing. (6 RT 1130) He had come from CYA and before testifying was in a holding tank with petitioner for one hour. He looked at petitioner to make sure he was the person who shot him. He decided that petitioner was the dude who shot him. (7 RT 1260-1264) At the time of the shooting he was 16 and a member of the Block Crip gang. (6 RT 1134)

TRAVON TOWNER, age 17, was at the Park with Romel Johnson, Demetrius Kidd, and Darryl Ferguson. (4 RT 603-604) He ran with Demetrius and Romel from the fight with Hispanics. (4 RT 611-612) After the third or fourth shot, Demetrius fell down. (4 RT 614) He helped the victim and then called the police. (4 RT 617-618)

ROMEL JOHNSON was a reluctant witness. Although subpoenaed, he refused to enter the courtroom. He left the courthouse, and a body attachment was issued for him. When brought to court, he indicated that he did not remember the incident because it was a long time ago. (5 RT 801-802,

909-910, 1007) An 18-year-old member of the Rolling 20s black street gang with the street name of "Time Bomb," he was not associated with a gang at the time of the shooting. (5 RT 904-906) Of those who entered the park with him, only his brother, Teavious Whatley, was a gang member. (5 RT 925)

Mr. Johnson had identified petitioner at trial as the person who shot Demetrius Kidd, and he was still sure of the identification. Prior to the shots being fired, Mr. Johnson had a conversation with petitioner, who was showing his tattoos. (5 RT 898-899). One was "YC" on an ear lobe, and another was "Boxer" across his back. Afterward, there was a fight followed by the shooting. (5 RT 900-902) As he was running, he looked back and saw that the only person shooting was petitioner, who was firing at the three of them. (5 RT 902-903) He was absolutely positive petitioner was the shooter because he remembered his face. (5 RT 969-970, 990)

FINDINGS OF FACT

1. TRIAL COUNSEL TED YAMAMOTO DID NOT FAIL TO INVESTIGATE AND PRODUCE POTENTIAL WITNESSES TO THE SHOOTING. (Petn. p. 43)

a. Although he felt an obligation to go along with his client's unexpressed sentiments that he not necessarily go after his client's brother, Mr. Yamamoto told his investigator

to see what he could find. (4 RT 717, 752; 5 RT 865)

b. Mr. Sakamoto spent 135 hours investigating this case, but much of it was wasted with unnecessary hours of attorney conferences. (6 RT 1078-1089, 1093)

c. No one contacted during the investigation told Mr. Sakamoto or Mr. Yamamoto that Ernesto Avila was the shooter. (5 RT 813, 860; 7 RT 1251; 8 RT 1302)

d. Ernesto Avila told Mr. Sakamoto that he was not at the park when the shooting started. (5 RT 811)

e. The only persons Ernesto Avila told that he was the shooter were two homeboys whose names he could not remember. (1 RT 80-81)

f. Ernesto Avila, Joanna Espinoza, and Elizabeth Luis agreed to get information on the other persons present during the shooting, but they never did. (5 RT 883-836, 839, 883; 886; 6 RT 1103)

g. Petitioner never gave Mr. Sakamoto the names of any other witnesses. (5 RT 854-856)

h. Inquiry by Mr. Yamamoto as to Mr. Denny's reasons for declaring a conflict would not have been productive because Ernesto was his client (RT 46, 126-127; 4 RT 709-710; 7 RT 1224-1225), and there was no reason to believe his own investigation would not produce the same results.

i. Mr. Yamamoto did not try to identify all persons

depicted in the photographs taken at the Baby Shower because of the difficulty in getting cooperation from some of the male witnesses and they would not be good witnesses. (4 RT 726-727, 735-737) They were throwing gang signs in the photographs. (Def. Exh. D & E; 2 RT 239) He did, however, ask Iasmin Luis, who took some of the photographs, to identify all of the people she saw at the Baby Shower. (2 RT 228)

j. Alfredo Sanchez was an independent and disinterested witness who corroborated those at the Baby Shower who placed petitioner in the vicinity of the barbecue, rather than the distant location of the shooting. (3 RT 398-399; 4 RT 741-743, 758)

k. The additional witnesses produced at the reference hearing were not available to the defense team due to the lack of cooperation of those contacted and the absence of a confession of guilt by Ernesto Avila until more than two years after the trial. (6 RT 1101-1102; 1 RT 80)

l. The additional witnesses who placed petitioner in the barbecue area at the time of the shooting but could not see the shooter because of the hill and the great distance, would have presented cumulative evidence. (Joanna Espinoza 2 RT 252; Jose Padilla 2 RT 296-297; Ramona Juarez 2 RT 328-329; Ramon Vasquez 2 RT 355; Rosa Luis 4 RT 674-676)

m. The four additional witnesses who testified that they saw Ernesto Avila fire the shots did not present credible testimony. From the area of the wall, Alice Dominguez testified she could see Ernesto chase one black guy and shoot at him three times. She saw the victim fall. (3 RT 503-505) Mr. Kidd actually fell across the street from the park. (5 RT 979-980) Even Ernesto Avila testified that he did not see the victim fall. (RT 42)

From the same barbecue area where Jose Padilla and others could not see the shooting (2 RT 296-297) and Joanna Espinoza could not even tell the direction the shots were fired from (2 RT 251), Terri Clark, who grew up with petitioner, testified that she saw Ernesto do the shooting. She did not provide this information to the defense investigator. (3 RT 566-568; 6 RT 1099-1101)

Angela Espinoza, whose sister was the mother of petitioner's child, was standing on a picnic bench when she saw Ernesto do the shooting "not that far" away. (RT 163) Standing on top of a bench, petitioner's cousin Marcella Riboni saw Ernesto do the shooting. (4 RT 648) The shooting was about 600 feet away. (Trial Exh. B)

2. MR. YAMAMOTO DID NOT FAIL TO DISCOVER FAVORABLE EVIDENCE. (Petn. pp. 44-46)

a. Graffiti sprayed on the park wall on August 19,

1990, would have been removed by the Lynwood Graffiti Program on the 19th or the 20th, but no such record exists. (3 RT 554-555)

b. The record of graffiti removal for August 21, 1990, (Def. J) does not corroborate defense witnesses that Crip gang graffiti was sprayed. (3 RT 547; 1 RT 31-33)

c. Of the five black teenagers who were involved in the altercation, two were gang members. Teavious Whatley was a member of the Rolling 60s. (5 RT 925) Mr. Kidd was apparently a member of the Block Crip Gang. (6 RT 1134) This information would have provided some support for the trial testimony that the victims had been writing on the wall. (7 RT 1175; Trial RT 385, 407-408) The issue was not critical, the graffiti being apparently the cause of the altercation, but it was not a justification for the shooting. Gang affiliations came out in the cross-examination of petitioner at trial. The defense decision not to emphasize gang affiliation was a valid trial tactic. (4 RT 748)

d. Demetrius Kidd was on juvenile probation at the time of trial. (6 RT 1134) Romel Johnson may have been on juvenile probation. (5 RT 907) Mr. Yamamoto filed a formal discovery motion for criminal history information. (4 RT 764-765) Trial prosecutor Greta Walker provided everything she had. (6 RT 1034) She never offered to help Mr. Kidd with his probation matter. (6 RT 1049) Further discovery

would not have led to admissible impeachment.

e. The broadcast procedures employed by the sheriff's deputies at the in-field identification were not suggestive. (7 RT 1166-1169, 1179-1182; 9 RT 1398-1402; 1411-1426)

3. MR. YAMAMOTO DID NOT FAIL TO IMPEACH ROMEL JOHNSON. (Petn. pp. 47-49)

a. The testimony of Deputy Gittisarn at the hearing as to whether Mr. Johnson identified petitioner as the Hispanic who threatened him in the park was substantially the same as Mr. Johnson's trial testimony. (7 RT 1175; Trial RT 129-130)

b. There is no inconsistency between Mr. Johnson's description of petitioner's securing the handgun by "creeping" away to the fence and his description of petitioner drawing the gun from his waistband during the chase. (Trial RT 130-131; 5 RT 987-990) The deputy taking the report did not ask him about how the gun was acquired. (7 RT 1176-1177)

c. Romel Johnson was an exceptionally persuasive witness.

MR. YAMAMOTO DID NOT FAIL TO CALL LOGICAL WITNESSES. (Petn. pp. 50)

a. Co-defendant Nieves was not available as a

witness at trial and counsel was not required to anticipate the Motion for New Trial. (Petn. Exh. K p. 3) The prosecutor was specifically delaying a disposition of Mr. Nieves' case until after petitioner's trial. (Trial RT 1)

b. Joanna Espinoza was in fact interviewed by both Mr. Yamamoto and Mr. Sakamoto. (2 RT 256, 260; 6 RT 1072-1075) She was not called as a witness because she was uncooperative and the jury would not give her testimony much weight due to the fact that petitioner is the father of her child. (8 RT 1282-1283)

c. Even though Joanna Espinoza was interviewed and was supposed to tell investigator Sakamoto who was present during the shooting, she did not even reveal the identity of her sister, Angela. (5 RT 835-836; 6 RT 1114-1115)

d. Angela Espinoza was not a credible witness.

e. Given the extensive contact between petitioner and the victims during the conversations and showing of tattoos as well as the immediate identification made at the scene, a witness identification expert was not essential. CALJIC 2.92 was sufficient to identify the significant issues. (CT 120) Petitioner and his brother, Ernesto, were not so similar in appearance as to allow a mistaken identification. (1 RT 113)

CONCLUSION

Trial counsel Ted Yamamoto provided effective and competent assistance at the time of petitioner's trial. His reliance on the independent testimony of Alfredo Sanchez, rather than other witnesses associated with the Young Crowd Gang, was a valid tactic. Due to consistent lack of cooperation from the immediate witnesses, he never had access to admissible evidence, however credible, identifying the actual shooter as Ernesto Avila. The compelling testimony of victim Romel Johnson was an obstacle he could not overcome.

Dated: August 31, 1993

/S/

Judge William R. Pounders
Referee

APPENDIX K

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

SECOND DIST
FILED
FEB 23 1993
JOSEPH A. LANE CLERK
J. GUZMAN
Deputy Clerk

In re	)	No. B071117
	)	
JESUS AVILA,	)	(Super.Ct.No. TA008385)
	)	
On Habeas Corpus.	)	ORDER
	)	

THE COURT*:

The matter is referenced to the Presiding Judge of the Los Angeles County Superior Court for the purpose of further assigning the matter for the taking of evidence relating to petitioner's allegations of ineffective assistance of counsel at time of trial and of making findings of fact responsive to said allegations. For this purpose, the superior court shall appoint additional counsel to represent petitioner at and during the pendency of the reference ordered herein, and shall determine the date, time, and place for any hearings to be conducted in connection therewith. The superior court shall file in this court its report containing detailed findings of fact and transcripts of any proceedings conducted in this matter.

The clerk of this court is directed to transmit a copy of this order to Jonathan B. Steiner and Nancy S. Coan of the California Appellate Project, counsel for petitioner in this proceeding and in the direct appeal number B060430.

*LILLIE, P.J., JOHNSON, J., WOODS (Fred), J.

APPENDIX L

APPENDIX I

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,	)	No. B060430
	)	
Plaintiff and Respondent,	)	(Super.Ct.No. TA008385)
	)	
JESUS AVILA,	)	COURT OF APPEAL-SECOND DIST.
	)	F I L E D
Defendant and Appellant.	)	APR -7 1993
	)	JOSEPH A. LANE CLERK
	)	Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Cary H. Nishimoto, Judge. Affirmed.

Jonathan B. Steiner and Nancy S. Coan, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Carol Wendelin Pollack, Senior Assistant Attorney General, William T. Harter, Supervising Deputy Attorney General, and Joseph P. Furman, Deputy Attorney General, for Plaintiff and Respondent.

Jesus Avila appeals from the judgment entered following

a jury trial in which he was convicted of attempted willful, deliberate, and premeditated murder with the use of a firearm and with the intentional infliction of great bodily injury. (Pen. Code, §§ 664/187, subd. (a), 12022.5, 12022.7.) He contends: "I. Appellant was denied effective assistance of counsel when defense counsel failed to produce various witnesses to testify that appellant's brother, not appellant, was the actual shooter. II. The ten day continuance taken by the court during appellant's trial was so inherently prejudicial to his ability to receive a fair trial that reversal is required."[1/]

Viewed in accordance with the usual rules on appeal (People v. Barnes (1986) 42 Cal.3d 284, 303), the evidence established that on the afternoon of August 19, 1990, Demetrius Kidd and Romel Johnson were in Ham Park in Lynwood with several companions when appellant and a friend approached. Kidd recalled that appellant was wearing a tank top and black "like khakis, work pants." Appellant asked Kidd and Johnson what gang they belonged to, and Johnson explained they were from Los Angeles and did not know anything about the gangs "out here."
Appellant had the letters "YC" tattooed on his earlobe and the same letters and the name "Boxer" tattooed on his back.

---

1. The first contention is the subject of a petition for writ of habeas corpus (B071117), which is being considered separately from this appeal.

When Johnson asked who had done the tattoos, appellant said that a friend had done them and pointed back toward a group of 30 to 40 persons gathered nearby. Telling Johnson and his companions to wait, appellant said that he would return with "[t]he dude who does the tattoos."

Approximately two or three minutes later, appellant returned with all the men of the group and warned Kidd's and Johnson's group that appellant's group would kill them if they did not leave the park, which appellant's group referred to as "their park." As the 30 to 40 people surrounded Kidd's and Johnson's group, appellant "started to creep off, walk away" toward an opening in the park fence where a group of girls was gathered. Appellant then returned, running toward Kidd's group with a gun in his hand.

In the meantime, Darryl Ferguson and another member of Kidd's and Johnson's group were assaulted by appellant's companions. Kidd's and Johnson's group ran off, then stopped when they realized that Ferguson had been "pinned in" by appellant's group. As appellant approached pointing a handgun at them, Kidd heard gunshots and saw "fire coming out of" the gun. Kidd again started to run but was struck behind the left ear by a bullet from appellant's gun. After falling to the ground, Kidd flipped over several times, then arose "staggering." Looking behind him, Kidd saw appellant still running towards him. Appellant continued to fire at

Kidd, firing four shots in all.

After sheriff's deputies were summoned, Johnson provided a description of appellant, including his tattoos. Johnson stated that appellant was wearing a tank top but that he could not recall the color of appellant's pants. Appellant was taken into custody shortly thereafter and brought to Johnson. Having conversed with appellant for two to five minutes and seen him with the gun, Johnson was able to recognize appellant's face and made a field identification of him as the shooter. Kidd also identified appellant while lying on the gurney of the ambulance that transported him to a hospital. Kidd underwent emergency head and neck surgery and remained in the hospital for about a month.[2/]

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2. Los Angeles County Sheriff's Deputy Niels Gittisarn testified that Johnson flagged down his vehicle after the shooting and provided appellant's description, including the tattoos. Appellant and another person were brought to the location, and Johnson identified them as Kidd's assailants. According to Gittisarn, Kidd was not asked to make an identification at that time and could not give a description of appellant when interviewed later at the hospital. The deputy testified initially that appellant was not wearing a shirt, then later that the booking report indicated appellant was wearing blue pants and a white shirt. He did not write the booking report and did not have an independent recollection of what color pants appellant was wearing when booked. However, Gittisarn did remember appellant's tattoos. (Cont'd.)

Sheriff's Deputy Gary Allen testified that he took appellant and Jose Nieves, a companion of appellant's, into custody. Neither appellant, who was wearing a white tank top

In defense, appellant claimed he was attending a baby shower and picnic in the park. After having a conversation about tattoos with a group of about five men, he went to prepare his food. He saw his friends approach the other group and one of his friends strike a member of the other group. He heard a bottle break as an altercation erupted but denied participating in it. However, he approached the area in which the fight was taking place, and some blood got on his arm when someone bumped into him as he walked away again. Appellant claimed that he was with his girlfriend and Elizabeth Luis when he heard gunshots, that he responded by grabbing his girlfriend's hand, and that all three then fell to the ground. At one point, some beer that he was holding spilled onto his shirt, but he did not recall whether any spilled on his hands. Shortly thereafter, the officers arrived as he was about to enter a friend's automobile and had him place his hands on the hood of the vehicle. Appellant was subsequently arrested. Approximately ten minutes after he arrived at the station, during which time he used the telephone, a gunshot residue test was performed.[3/]

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and dark pants and had blood on his forearm, nor any of his companions possessed a gun. Allen's recollection was that Kidd identified appellant while lying on the gurney.

3. A sheriff's department criminalist testified that the

Appellant identified a photograph he claimed was taken at the party on the day of the shooting. He stated that the clothing he wore that day, as reflected in the picture, consisted of "[l]ight blue khakis [and] a white T-shirt . . . ." He acknowledged on cross-examination that he was wearing a tank top underneath his shirt but claimed that, when he conversed with Kidd and Johnson, he was wearing the shirt and his tattoos were "barely visible like at the tips." He also acknowledged being in the "Young Crowd" gang and the only member with "Boxer" on his back.[4/]

---

results of the gunshot residue test were inconclusive.

4. Iasmin Luis testified she took pictures at the park on August 19, 1990, including the picture appellant identified during his testimony. Elizabeth Luis stated she was at the park that day because the baby shower was given for her. When she heard the shots, she was near the park entrance with appellant and his girlfriend. Appellant grabbed his girlfriend, who, in turn, grabbed her, and the three of them went down on the ground for a few seconds. Afterwards, they went back to the party area to collect the cake and presents. Elizabeth Luis did not see any guns that day and was positive appellant did not do the shooting. Both, she and Blanca Montoya testified that appellant was wearing light blue pants and, a white T-shirt, and Montoya recalled that about nine other people were wearing black pants on that occasion, with "[m]ostly everybody" wearing white tops.

Alfredo Sanchez testified he was at his cousin's house next to Ham Park on a Sunday in August 1990. At approximately 4:00 to 4:30 p.m. he heard gunshots. When he looked toward the park, he saw appellant down on the ground

Jury selection in appellant's trial was completed on Thursday, February 7, 1991. Kidd and Johnson testified on that day and on the following day. Thereafter, the trial was continued, without objection, to Tuesday, February 19. In recessing the trial, the court admonished the jurors, "Don't talk about the case. Don't come to any final conclusion about anything that you have heard to this point." The remainder of the evidence was presented after the trial reconvened. During deliberations, the jury requested a rereading of the entire testimony of Kidd and Johnson. Following the readback, the jury resumed deliberations and returned the guilty verdict.

Appellant subsequently moved for a new trial on the ground of newly discovered evidence. His motion was accompanied by the declarations of Oscar Rodriguez and Alice Dominguez, who claimed they saw appellant's brother, Ernesto Avila, firing at Kidd and his companions on the day of the shooting. They said they had not come forward sooner because they did not want to get Ernesto Avila in trouble and did not think appellant would be convicted of a crime he did not commit.

Nieves also submitted a declaration in which he claimed

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covering about three women. Appellant was wearing a white T-shirt and light blue pants and, although Sanchez did not know appellant personally, he had seen him before and noticed the "Boxer" tattoo on his back.

that he saw appellant walk away from the fight and that appellant had rejoined the party by the time the shots rang out. Nieves stated he "was unable to come forward earlier with this information because [he] was arrested and was a defendant on this same case."

The declaration of appellant's counsel stated that following the trial he had received "numerous telephone calls from a number of persons who stated that they were present at Ham Park on August 19, 1990 . . . . [¶] After having interviewed approximately seven individuals the declarations of Alice Dominguez, Oscar Rodriguez and Jose Nieves were prepared for this motion." Counsel's declaration indicated that the case against Nieves, who was charged with assault with a deadly weapon, "was held in abeyance until the conclusion of [appellant's] jury trial," and that Nieves was "now available [to testify in appellant's behalf] since his involvement in this case has concluded." Counsel also stated, "I had no prior knowledge of the information given to me by Alice Dominguez and Oscar Rodriguez. In fact, I did not even know Alice Dominguez and Oscar Rodriguez until they came forward and contacted my office."

In opposition to the motion, Sheriff's Deputy Loy Luna, a gang expert, identified a picture admitted into evidence as that of Ernesto Avila, known on the street as "Indio." Luna also testified that the sheriff's department had obtained

information that Rodriguez was a member of the "Young Crowd" gang.

The trial court, noting that the new evidence was cumulative because other witnesses, including a disinterested witness, had testified that appellant had not fired the gun, concluded a different result was not likely on retrial and denied the motion.[5]

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5. In denying the motion for a new trial, the court stated: "I have considered the defense motion for new trial at great length, and I've given it a lot of consideration. And the sum and substance of it is that I don't think this is newly discovered evidence as an overall conclusion. The evidence in this case of an alibi nonparticipation was in fact offered during the trial. [¶] True enough, the name of the third person wasn't mentioned, but the essence of the defense was he wasn't there, he's not the one who did it. Regardless of who else did it, he wasn't the one. [¶] The jury heard that evidence. They heard from a witness that has no association with the defendant, who lives next-to the park, who testified to the same thing. [¶] I would note that the defendant's own testimony during the trial was at odds materially with some aspects of the other defense witnesses' testimony that he wasn't there because he by his own testimony said that he was and that's how he got the blood on his arms. [¶] The fact that other persons are saying the same thing at this point in time doesn't make it newly discovered, because the issue itself was raised in fact during the course of the trial. The jury heard it. The jury rejected it. They rejected it in about 15 minutes, as I recall. [¶] The evidence for that reason is cumulative, because the entire defense was based upon this one issue. I don't believe under the circumstances that there's any reason to believe that a different result would be obtained on a retrial. [¶] And there is, notwithstanding that, no indication of

The contention that appellant was denied effective assistance of counsel because counsel failed to produce witnesses to testify that Ernesto Avila, not appellant, was the actual shooter is without merit. Appellant's counsel had presented testimony, including the testimony of an apparently unbiased witness, that appellant had neither participated in the altercation nor fired the shot that struck Kidd. Although the declarations, of Rodriguez and Dominguez accompanying the motion for new trial named the alleged shooter, the trial court reasonably concluded this apparently cumulative evidence would not have affected the outcome. (Cf. People v. Dyer (1988) 45 Cal..3d 26, 50-51.) Rodriguez and Dominguez stated in their declarations that they had not previously wanted to reveal that Ernesto Avila fired the gun, and appellant's counsel indicated he had not previously known the two. In view of these circumstances and counsel's explanation, appellant has failed to establish ineffective assistance of counsel based on this record. (People v. Ledesma (1987) 43 Cal.3d 171, 217-218; cf. People v. Farmer (1989) 47 Cal.3d 888, 916; People v. Sanders (1990) 221 Cal.App.3d 350, 362-363.) The contention that the

---

why this evidence wasn't obtained earlier, especially since . . . at least two of the witnesses said that they were there at the . . baby shower. [¶] So under the circumstances, I feel that there simply is not enough here to warrant granting a motion for new trial. And I am constrained to deny the motion."

continuance ordered by the court during the trial was, by its length, so inherently prejudicial as to require reversal is similarly without merit. Apart from whether appellant is precluded from raising the issue on appeal by his failure to object to the continuance at trial (cf. Castaneda v. Municipal Court (1972) 25 Cal.App.3d 588, 593), it is clear that there were two weekends and at least one holiday during the intervening period, reducing the number of court days actually involved to four or five. (Cf. People v. Santamaria (1991) 229 Cal.App.3d 269, 281.) Furthermore, the court admonished the jury to refrain from coming to a conclusion based upon the testimony it had heard prior to recessing for that period. The jury's request for a readback of that testimony after it resumed deliberations indicates the jury was mindful of the court's admonition and that no prejudice occurred. (People v. Katzman (1968) 258 Cal.App.2d 777, 789-790; compare People v. Engleman (1981) 116 Cal.App.3d Supp. 14, 20-21.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

WOODS (Fred), J.

We concur:

LILLIE, P.J

JOHNSON, J.

APPENDIX M

APPENDIX M

Former § 2254(d) provided:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit --
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional

right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or;

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court

proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(3)

Supreme Court, U.S.
FILED
FEB 25 2003
OFFICE OF THE CLERK

No. 02-855

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE M. GALAZA, Warden, et al., *Petitioners,*

v.

JESUS AVILA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy Attorney General
*SHAWN McGAHEY WEBB
Deputy Attorney General
*Counsel of Record
300 South Spring Street
Los Angeles, CA 90013
Telephone: (213) 897-2276
Fax: (213) 897-2263
Counsel for Petitioners

8 pp

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IN THE SUPREME COURT OF THE UNITED STATES

No. 02-855

GEORGE M. GALAZA, Warden, et al., *Petitioners,*

v.

JESUS AVILA, *Respondent.*

REPLY TO OPPOSITION TO PETITION

On November 26, 2002, petitioner George M. Galaza, Warden of the State Prison at Corcoran, California, filed a Petition for a Writ of Certiorari ("Pet."), to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Avila v. Galaza*, 297 F.3d 911 (2002). On February 10, 2003, respondent Jesus Avila filed his Brief in Opposition (Opp.). The Warden respectfully submits this reply.

INTERVENING PROCEDURAL EVENTS MIGHT HAVE MADE THIS CASE MOOT; IF SO, THE WARDEN REQUESTS VACATUR OF THE LOWER FEDERAL COURT PROCEEDINGS

In granting the petition for writ of habeas corpus, the Ninth Circuit ordered the State to retry Avila within sixty days or release him. (Pet. at 5.) The sixtieth day was January 6, 2003. (Pet. at 5.) Avila, however, agreed to a delay to and including March 17, 2003.

On February 21, 2003, the Los Angeles County District Attorney entered an agreement with Avila pursuant to which Avila pleaded guilty to attempted murder and admitted the weapons-use allegations as charged in the original accusatory pleading. The plea provides for Avila's release with credit for time served. Counsel for the Warden was informed of the plea on February 24.

The Warden advises the Court of the foregoing in accordance with his "duty . . . to bring to the federal tribunal's attention, '*without delay*,' facts that may raise a question of mootness." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.23 (1997), *quoting Board of License Comm'rs of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (per curiam). It is, however, the Warden's position that entry of the plea does *not* make the current case moot inasmuch as Avila's plea constitutes an official adoption of the existing conviction as to which collateral legal consequences attach. *Sibron v. New York*, 392 U.S. 40, 55 (1968) (it is an "obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences"). Nonetheless, if the Court should find the matter moot, the Warden would ask for the equitable remedy of vacatur.

The "leading case" on vacatur is *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950). *U.S. Bancorp Mortgage Company v. Bonner Mall Partnership*, 513 U.S. 18, 22 (1994). In *Munsingwear*, the government filed an action seeking injunctive relief and treble damages against the respondent for failing to comply with pricing regulations. The district court considered the injunctive action first and determined that the respondent's prices complied with regulations. While the government's appeal from that decision was pending, the commodity at issue was deregulated. The respondent moved to dismiss the appeal as moot, and the court of appeals granted that motion. The respondent then returned to the district court and sought dismissal of the treble damages portion of the complaint, arguing that the district court's unreversed decision denying injunctive relief was res judicata

as to the remainder of the government's complaint. The district court agreed and granted the motion. The court of appeal affirmed. *Id.* at 37. On certiorari, this Court considered the government's request for vacatur of the lower courts' decisions. After noting that its "established practice" in dealing with civil cases that become moot while pending certiorari or a decision on the merits "is to reverse or vacate the judgment below and remand with a direction to dismiss," the Court declined to grant the government's request. *Id.* at 39. As the Court explained, the government had "slept on its rights" and was therefore not entitled to the remedy of vacatur in that case. *Id.* at 40-41.

Although the Court denied relief in *Munsingwear*, that case served as the basis for vacatur many times in the ensuing years. *See, e.g., Lake Coal Co. v. Roberts & Schaefer Co.*, 474 U.S. 120 (1985) (per curiam) (decision of court of appeals vacated and matter remanded for dismissal following settlement of underlying causes of action); *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 93 (1979) (per curiam) (where mootness was clear, decision of court of appeals ordered vacated and case remanded with instructions to vacate district court judgment and remand for dismissal of complaint). However, in *U.S. Bancorp*, 513 U.S. 18, the Court characterized *Munsingwear*'s professed "established practice" as overly broad dictum and found it inapplicable where mootness resulted from the parties' settlement of the case.

At issue in *U.S. Bancorp* was the petitioner's request that the lower court proceedings be vacated following the parties' negotiated settlement. 513 U.S. at 23. The Court distinguished between mootness caused by "happenstance," as in *Munsingwear*, or the unilateral action of the party who prevailed below, and mootness resulting from the parties' settlement of the matter. The Court determined that in the former situations, the party seeking review of an adverse decision is frustrated by the vagaries of circumstance and forced to acquiesce in the judgment. Consequently, in such instances, *Munsingwear*'s "established practice" of vacating the judgment below and remanding with directions to dismiss makes sense. *Id.* at 25 n.3.

In the latter situation, however, the losing party has voluntarily forfeited his right to appeal or petition for writ of certiorari and surrendered his claim to the equitable remedy of vacatur unless he can demonstrate that exceptional circumstances support its application. *Id.* at 25, 29. Whether exceptional circumstances warranting vacatur exist must be determined in light of the public interest because, as the Court explained, "'[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.'" *Id.* at 26, *quoting Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting).

The Warden acknowledges that the settlement between Avila and the Los Angeles County District Attorney moves this case beyond the parameters of *Munsingwear*'s "established practice" and into the realm of *U.S. Bancorp*'s "exceptional circumstances" test. That test, however, has been met. As explained in the certiorari petition (Pet. at 5), and acknowledged by Avila in his opposition (Opp. at 8), the Ninth Circuit granted habeas corpus relief on alternate grounds. First, that the state court's decision was automatically "contrary to" federal law pursuant to 28 U.S.C. § 2254(d)(1) because it did not cite or apply this Court's precedent. (Pet. at 5.) Second, that the state referee's factual findings were "clearly erroneous" within the meaning of 28 U.S.C. § 2254(e)(1) such that the Ninth Circuit was left with a "firm conviction" that the state court's determination was wrong and the one Avila urged was correct. (Pet. at 5.) The first ground was *proved* to be "in error" by this Court's subsequent decision in *Early v. Packer*, ___ U.S. ___, 123 S.Ct. 362, 365 (2002). (Pet. at 13.) And the second ground, inasmuch as it is implicitly based on a belief in Avila's asserted innocence, is equally "in error" given his recent acknowledgment of guilt. These errors effectively rebut the presumption of correctness that would normally attach to the Ninth Circuit's decision herein and demonstrate that the public interest would be best served by its vacatur.

CONCLUSION

For the reasons set forth in the petition, the Warden respectfully asks the Court to issue a writ of certiorari so that the merits of this case may be addressed. Alternatively, for the reasons set forth in this reply, the Warden asks the Court to issue a writ of certiorari, vacate the decisions of the lower federal courts and remand with directions to dismiss the petition for writ of habeas corpus.

February 25, 2003

Respectfully submitted,

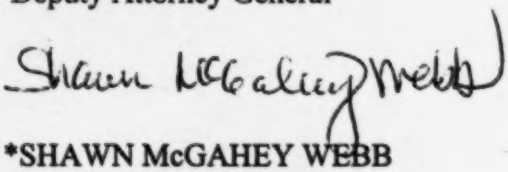
BILL LOCKYER
Attorney General of the State of California

MANUEL M. MEDEIROS
State Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

DONALD E. DE NICOLA
Deputy Attorney General



*SHAWN McGAHEY WEBB
Deputy Attorney General
*Counsel of Record

Counsel for Petitioners

No. 02-855 (4)

IN THE

SUPREME COURT OF THE UNITED STATES

GEORGE M. GALAZA, Warden, et al., *Petitioners*

v.

JESUS AVILA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Nancy S. Coan, #124882
Paulette Donsavage, #158681
c/o Kaufman & Logan, LLP
111 Pine Street, Suite 1300
San Francisco, CA 94111
(415) 392-6677
(415) 391-4639 (fax)

Counsel for Respondents

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B. The Ninth Circuit granted strict deference to the state court's factual findings and found that Respondent Jesus Avila had rebutted the presumption of correctness with clear and convincing evidence under 28 U.S.C. Section 2254(e)(1). 11

C. The Ninth Circuit's holding is consistent with the holding in *Early v. Packer* because the state court's reasoning and result contradicted the governing law as set forth in *Strickland v. Washington*. 18

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that the Court deny the petition for writ of certiorari.[1] His claims of ineffective assistance are compelling. Respondent has spent 12 years in prison for a crime committed by another man. The Ninth Circuit in a unanimous decision held that Jesus Avila's trial attorney provided ineffective assistance of counsel because he failed to investigate and introduce evidence that would have raised a reasonable doubt as to Jesus's guilt. That holding is squarely in accord with Supreme Court and court of appeals precedent and creates no conflict among the circuits.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 297 F.3d 911 and is reprinted at page 3 of the Appendix to the Petition for Writ of Certiorari. The order denying Petitioners' petition for rehearing en banc is reproduced in the Appendix at p. 2. The decisions of the United States District Court for the Central District of California are reprinted at pages 28, 29 and 39 of the Appendix.

STATEMENT OF THE CASE

On August 19, 1990, Jesus Avila and 30 to 40 of his friends and acquaintances attended a baby shower in Ham Park in Lynwood, California. Respondent and a number of his male friends were members of a primarily Hispanic gang called the Young Crowd gang. During the shower a number of young black men, some of whom belonged to other gangs, entered the park. This group included Romel Johnson, Darryl Ferguson, Teavious Whatley, Travon Towner and Demetrius Kidd. Respondent and his friends

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[1] This brief will also refer to Respondent as "Jesus Avila" or "Jesus."

approached the newcomers and asked what gang they were from. After talking to these other men for a while and showing off his tattoos, Respondent left to rejoin his friends at the shower. As he was walking away, Jesus saw two of the black males walking across the park with a can of spray paint.

While preparing his food, Respondent saw his friends heading towards the group of black males near the wall in the park. Respondent walked over to the area carrying food and beer to see what was going on. When he arrived, the black males were spray painting the wall. A fight broke out between Respondent's friends and the black males. Realizing that his girlfriend would be upset that he was involved in a fight, Respondent started walking away from the area of the fight to the Walnut Street entrance to the park where his girlfriend Joanna Espinosa and her friend Elizabeth Luis were standing. He asked the women where they were going when he heard gunshots. Respondent pulled the young women down to the ground. When the shots stopped and he got up, Respondent saw a number of his friends run out of the park through the Walnut Street entrance. Respondent did not realize that anyone had been shot and saw no reason to run.

Respondent and a few others remaining in the park began to gather up the presents and food when the police pulled up to the Walnut Street entrance. The police jumped out of their cars, displayed their guns and told everyone to freeze. Respondent was asked if he had been drinking to which he responded, "Yes." The police told him he would be spending the night in jail because he was under the influence. The police did not find Respondent or his friends in possession of a gun. The police officers also testified that at the time they arrived at the park, Respondent and Jose Nieves were the only male Young Crowd gang members left in the park. Deputy Allen even testified that

in most cases, gang members who are involved in a confrontation disperse after shots are fired.

Respondent was handcuffed, put in the police car, along with his friend Jose Nieves, and taken to the area where Demetrius Kidd, the shooting victim, had fallen down. Romel Johnson and Demetrius Kidd identified Respondent as the shooter at the in-field identification.[2] Despite his identification of Respondent as the shooter, Kidd testified at Jesus Avila's trial that he was sure the shooter was wearing black pants. On the day of the shower, Respondent was wearing light blue khakis, a white shirt and black house slippers. This was confirmed by pictures taken at the party and the pants that were put into evidence at Respondent's trial. The gunshot residue test taken of Respondent's hands at the time he was detained did not show evidence of gunpowder.

After his arrest, attorney George Denny initially represented Respondent. Mr. Denny knew Respondent and Respondent's brother Ernesto because he represented both of them, as well as others, in connection with a federal civil action against the Los Angeles Sheriff's Department. As was revealed at Respondent's state court evidentiary hearing in 1993, about one week after the shooting, Respondent's brother Ernesto approached Mr. Denny and his investigator and asked them to please help Respondent. During this conversation, Ernesto admitted that he, not Respondent, was the shooter.[3] In light of this conflict of interest, new counsel, Ted Yamamoto, was appointed.

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[2] Contrary to Petitioner's assertion, Johnson and Kidd did not independently identify Respondent as the shooter at in-field show ups. *Petition* at 3. Deputy Gary Allen testified that he and the other officers did not conduct separate in-field show ups for Johnson and Kidd. He further testified that neither of the men was admonished in any manner prior to the show up identifications.

[3] Petitioner implies that Ernesto waited for over two years before admitting he was the shooter. (*Petition* at 3.) This simply is not true. The testimony presented at the

Before Respondent's trial Yamamoto became convinced that Ernesto Avila, not Respondent, was the shooter. Despite this belief, he conducted no investigation with respect to a defense of third-party culpability and did not instruct his investigator to do so either. Yamamoto testified at the state evidentiary hearing that he assumed Respondent's mother would not want him to implicate Ernesto in the shooting. Yamamoto also said he continued to hope that Ernesto would come into the courtroom sometime during the trial to confess to the crime. *See Appendix* at 10-11.

There were 30 to 40 potential witnesses to the shooting in Ham Park. However, trial counsel failed to interview almost all of the individuals in the park on the day of the shooting. In fact, he did not personally interview a single witness before the trial began. Further, his investigator, despite billing 100 hours of pre-trial investigative time, interviewed only those witnesses who happened to be in the area of Ham Park when he went to view the scene. Counsel and his investigator did not interview Respondent's brother Ernesto, did not interview any of the police officers who testified at trial, and did not even attempt to interview a single one of the black males (including the victim) who entered Ham Park on the day of the shooting. Trial counsel failed to subpoena a single witness to Respondent's trial.

At trial the prosecution presented an almost open and shut case against Jesus Avila. Both Romel Johnson and Demetrius Kidd (the victim) identified Jesus as the shooter. The remaining prosecution witnesses, primarily sheriff's deputies who came on the scene after the shooting, fell in line. Little or no attempt was made by trial counsel to point out the weaknesses in their testimony. Furthermore, trial counsel attempted to

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evidentiary hearing established conclusively that Ernesto confessed to George Denny and his investigator shortly after the shooting. (*Appendix* at 12.)

present an alibi defense only through three fairly weak witnesses, none of whom was in a position to even view the actual shooting. One of these three "alibi" witnesses (Blanca Montoya) even perjured herself by testifying that Ernesto Avila (Respondent's brother) had not been in the park on the day of the shooting. Had trial counsel examined photographs taken at the baby shower on the day of the shooting, he would have seen that Ernesto was in fact in the park that day.

Trial counsel completely failed to present a third party culpability defense through the testimony of *four eyewitnesses* who saw Ernesto fire the shots at Demetrius Kidd or through Ernesto himself. In fact, he even failed to interview Ernesto before trial to see if he would be willing to testify. Yamamoto also failed to present the testimony of several credible alibi witnesses who were in a position to see where Respondent was at the time of the shooting. Trial counsel also failed to discover evidence to impeach the testimony of the prosecution witnesses, including the investigating officer. He failed to discover and present evidence concerning the gang affiliations of the Black males. Trial counsel also failed to investigate and discover much evidence that would have impeached the testimony of Romel Johnson and Demetrius Kidd – key prosecution witnesses. In addition, trial counsel failed to address the suggestiveness of the in-field identification procedures employed by the sheriff's department.[4] *See Appendix* at 12.

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[4] The identification of Respondent by the victim was fraught with inconsistencies. According to Kidd and Johnson's friend, Travon Towner, both Kidd and Johnson were running in front of him at the time of the shooting and neither of them looked back as the shots were being fired. Towner also testified at the evidentiary hearing that Kidd did not identify the shooter either shortly after the shooting or while in the hospital. Trial counsel did not interview Towner or subpoena him for trial. Towner's testimony would have caused the jury to seriously question the testimony of the only two witnesses who identified Respondent as the shooter. Further, the in-field identification of Jesus Avila as the shooter was tainted by the suggestive identification procedures employed by the

At Respondent's state evidentiary hearing, ordered by the California Court of Appeal, a very different picture of the events that took place in Ham Park was painted. At the outset, Ernesto Avila testified that he was the person who shot Demetrius Kidd on August 19, 1990 in Ham Park.[5] Ernesto further testified that he told this to Respondent's pre-trial counsel and his investigator shortly after the shooting. Further, Ernesto waived the attorney-client privilege thereby allowing George Denny to testify that Ernesto had confessed the crime to him within several days of the shooting. Additionally, four eyewitnesses testified that Ernesto Avila fired the shots in Ham Park on August 19, 1990. They included Terri Clark, Alice Dominguez, Marcella Riboni and Angela Espinoza. Five percipient witnesses also testified at the evidentiary hearing that Jesus was near them at the time the shots were fired, that he was in a different area of the park from where the shooting occurred and that he was not the shooter. These witnesses included Jose Padilla, Joanna Espinoza, Ramona Juarez, Ramon Vasquez and Rosa Luis.[6] Substantial evidence was also presented to impeach the testimony of prosecution witnesses and to rebut prosecution evidence. *See Appendix* at 12.

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sheriff's department. For example, only two men were arrested and taken to the location of the victims. Of these two, only Respondent was removed from the car and the officers failed to conduct separate in-field show-ups for each of the victims (Kidd and Johnson). Further, neither victim was admonished in any way prior to the identification. Kidd testified at the evidentiary hearing that he heard the police broadcasts as he was lying on the stretcher so assumed that the police were bringing over the actual shooter. He said that rather than identifying the shooter, he was identifying the person with the tattoos whom he had seen and spoken to earlier. Kidd also testified that he did not get a good look at the shooter and was not certain Respondent was the person who shot him.

[5] It should be noted that the statute of limitations for attempted murder had not run at the time Ernesto testified. He was not given any kind of immunity or promised leniency in exchange for his testimony.

[6] As they testified at the evidentiary hearing, all these witnesses were willing to testify at Respondent's trial, but none were asked to do so by trial counsel. In fact, with the exception of Terri Clark, none were even contacted or interviewed before trial.

Despite the mountain of evidence presented at the state evidentiary hearing, the referee dismissed all the witnesses who identified Ernesto Avila as the shooter as lacking credibility.[7] He also found that the witnesses were not available to the defense at the time of trial due to their lack of cooperation, despite their testimony that they would have testified had they been asked. He further dismissed all the additional alibi witnesses as providing cumulative evidence. *Appendix* at 125-126.

SUMMARY OF THE ARGUMENT

The Petitioner's writ of habeas corpus in this case was granted for alternative reasons. First, the Ninth Circuit held that the state court decision was "contrary to" federal law under 28 U.S.C. § 2254(d)(1). In the alternative, the Ninth Circuit granted the petition under 28 U.S.C. § 2254(d)(2) because the state court adjudication of Jesus Avila's claims "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Appendix* C at 14-15. In analyzing Respondent Jesus Avila's claims the court of appeals looked to the last reasoned decision of the state court which was the report of the referee from the state evidentiary hearing in 1993.

Notably, the Ninth Circuit did not even reach three other claims of ineffective assistance of counsel raised by Avila in his petition for writ of habeas corpus, as it concluded that trial counsel was ineffective for failing to investigate and present evidence at trial that Jesus Avila's brother, Ernesto, was the shooter. *Appendix* C at 13, n. 5.

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[7] This finding is in direct conflict with statements made by the Referee on the record during the evidentiary hearing. Twice he said that Alice Dominguez, an independent witness who identified Ernesto as the shooter, was a credible witness.

ARGUMENT

A. The court of appeals properly found that the state court's decision was based on an objectively unreasonable determination of the facts in light of the evidence and its holding is in accord with Supreme Court and court of appeals precedent.

In analyzing Respondent's claims of ineffective assistance of counsel, the court of appeals strictly applied the language of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and granted Respondent's petition because it found that the last reasoned decision of the state court was both "contrary to" federal law and, in the alternative, was based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." (*Appendix* at 14-15, citing 28 U.S.C. § 2254 (d)(1) and § 2254(d)(2).) In reviewing Respondent's claims under *Strickland v. Washington*, 466 U.S 668 (1984), the court of appeals found that trial counsel was incompetent and Respondent was prejudiced thereby.

Petitioner misstates the facts in asserting that the court of appeals applied a standard of review not sanctioned by the AEDPA. The Ninth Circuit did not, as Petitioner alleges, apply a "firm conviction" standard of review. Rather, the court of appeal's reference to the term "firm conviction" was limited to its analysis of Respondent's claims under § 2254(d)(2). The Ninth Circuit held that it could grant the habeas petition under § 2254(d)(2) only if it found that the state court referee's findings were "'clearly erroneous' such that we are left with a 'firm conviction' that the determination made by the state court was wrong and that the one [Jesus] urges was correct." (*Appendix* at 15, citing *Van Tran v. Lindsey*, 212 F.3d 1143, 1153-54 (9th Cir. 2000.) The citation to *Van Tran* and its use of the "firm conviction" standard was not a

lessening of the standard of review, as Petitioner suggests, but rather an attempt to explain how deferential a standard of review is required under the AEDPA.

In *Van Tran*, the Ninth Circuit noted that the Supreme Court, in *Williams v. Taylor*, 529 U.S. 362 (2000), did not specifically define the term "unreasonable" in the context of § 2254(d)(1) cases involving "unreasonable applications" of federal law, but had provided some guidelines to help the courts in applying the concept. The *Van Tran* court then went on to further clarify the proper application of the term and standard of review in cases involving an "unreasonable application" of federal law under 28 U.S.C. § 2254(d)(1).[8] In looking for guidance in determining what constitutes an "unreasonable application" of federal law the Ninth Circuit looked to the doctrine of "clear error" as a "source for the most helpful body of precedent." *Van Tran*, 212 F.3d at 1152.

While noting the limitations of the "clear error" cases, the Ninth Circuit observed that "[T]he clear error doctrine . . . most nearly reflects the *kind of respect* for other courts' judgments that Congress and the Court felt was appropriate here." *Id.* at 1153, emphasis added. The Ninth Circuit believed that the "clear error" standard most closely resembled the objective standard of "unreasonableness" sanctioned by the Supreme Court in *Williams v. Taylor*, 529 U.S. at 409-411. The Ninth Circuit went on to explain that "clear error" generally allows for reversal "only where the court of appeals is left with a 'definite and firm conviction' that an error has been committed." It held that under the

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[8] While the court of appeals' use of the "firm conviction" language in this case was primarily in reference to the analysis of Respondent's claims under § 2254(d)(2), rather than under § 2254(d)(1) as in *Van Tran*, both subsections of § 2254 contain the term "unreasonable" in their text. It would seem that the standard by which reasonableness is to be judged would be the same under subsection (d)(1) and (d)(2) inasmuch as the legislature chose to use the same term in both. Petitioner apparently agrees. *Petition* at 10.

AEDPA it would reverse a state court's decision as involving an "unreasonable application" of clearly established federal law, "when our independent review of the legal question does not merely allow us ultimately to conclude that the Petitioner has the better of two reasonable legal arguments, but rather leaves us with a 'firm conviction' that one answer, the one rejected by the court, was correct and the other, the application of the federal law that the court adopted, was erroneous – in other words that clear error occurred." (*Id.* at 1153-1154.)[9] See *Appendix* C at 15 wherein the court of appeals in this case cites *Van Tran* at 1153-1154 and its lengthy discussion of what constitutes an "unreasonable application of federal law."

Petitioner's concern that the Ninth Circuit has "eviscerated" the inquiry into the reasonableness of the state court's factual determinations and will allow relief solely upon a determination that the state court was wrong is unfounded. *Petition* at 11. As *Van Tran* held, "Although we believe that the ruling was erroneous, it was not 'contrary to' clearly established federal law; more important, the error did not involve an unreasonable application of federal law. Put differently, there was error, but not clear error." *Van Tran v. Lindsey*, 212 F.3d at 1157. Likewise in a recent case involving ineffective assistance of counsel, the Ninth Circuit held that its conclusion that the state court erred in its application of federal law, "does not suffice to afford Delgado federal habeas relief. We must also determine whether the state court's decision was *objectively unreasonable*." *Delgado v. Lewis*, 223 F.3d 976, 981 (9th Cir. 2000), citing *Williams v. Taylor*, 529 U.S. at 409-410, emphasis added. "Absent clear error, the deference we owe

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[9] It is worth noting that in *Van Tran* the Ninth Circuit denied habeas relief holding that the state court erred but that the error was not "contrary to" and did not involve an "unreasonable application" of federal law. *Van Tran*, 212 F.3d at 1155.

state court decisions dictates a denial of habeas relief, even when we conclude that a legal error has been committed." *Delgado*, 223 F.3d at 981.[10]

Throughout its opinion, the Ninth Circuit weaves in the inquiry both as to the reasonableness of trial counsel's representation (under *Strickland*) and the reasonableness of the state court referee's findings thereon. *Appendix* at 15-26. There can be no doubt that the court of appeals properly found an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." The Ninth Circuit in this case granted the petition for writ of habeas corpus because it found that the state court erred in its application of federal law and that that error was objectively unreasonable.

B. The Ninth Circuit granted strict deference to the state court's factual findings and found that Respondent Jesus Avila had rebutted the presumption of correctness with clear and convincing evidence under 28 U.S.C. Section 2254(e)(1).

Contrary to the Petitioner's assertions, the federal circuit courts are not in disarray with respect to the standard of review applicable to cases under § 2254(d)(2) and § 2254(e)(1).[11] In particular, the Ninth Circuit seems to quite clearly understand the interplay between both sections of the AEDPA. Section 2254(d)(2) which allows for the granting of a petition for writ of habeas corpus when a state court decision "was based on an unreasonable determination of the *facts* in light of *the evidence* presented,"

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[10] The *Delgado v. Lewis* opinion was authored by Judge Pregerson of the Ninth Circuit, just as was the opinion in Respondent Avila's case.

[11] In this regard, Petitioner quotes a footnote in a Ninth Circuit opinion wherein the court said, "As an analytical matter, the relationship between § 2254(d)(2) and § 2254(e)(1) is not entirely clear." *Petition* at 11. Petitioner, however, omits the rest of the footnote which reads, "Both appear to address state court factual findings. We need not define the precise relationship, however, as the standard of review appears to be clear error under both statutory provisions." *Green v. White*, 232 F.3d 671, 672, n. 3, citations omitted. It appears that no petition for writ of certiorari was filed by Petitioner in the *Green* case.

presupposes that state court factual findings will be reviewed by federal courts in certain cases. (Emphasis added.) Section 2254(e)(1) states clearly that "a determination of a factual issue made by a State court shall be presumed to be correct" and that the applicant has the "burden of rebutting the presumption of correctness by clear and convincing evidence."

Rather than skirting the reasonableness inquiry, the court here used the "firm conviction" quote from the *Van Tran* case to explain that simple error was not enough to entitle one to federal habeas relief. Rather, the error had to be of a magnitude that the court of appeals was left with a "firm conviction" that the factual findings were "clearly erroneous" and that "the determination made by the state court was wrong and that the one [Jesus] urges was correct." *Appendix* at 15.[12] Petitioner observes that it is generally acknowledged that the AEDPA requires increased deference to state court factual findings. *Petition* at 11. It then cites several cases from various circuits to demonstrate this fact. However, Petitioner then goes on to cite cases, *all from circuits other than the Ninth*, wherein it argues the federal courts appear ready to interpret §§ 2254(d)(2) and 2254(e)(1) pursuant to "pre-AEDPA standards such as those found in former §§ 2254(d)(6) and (d)(8)." The references that follow are to cases out of the Second, Fifth and Eighth Circuit Courts of Appeals – not the Ninth Circuit! *Appendix* C at 12. Thus, it appears that Petitioner's concern is not over the Ninth Circuit's interpretation of

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[12] In attempting to enlighten litigants as to the "height of the hurdle" they must clear in showing that a fact found by a trial court was "clearly erroneous," the Ninth Circuit in *Fisher v. Roe* quoted a decision out of the Seventh Circuit: "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must, as one member of this court recently stated during oral argument, strike us as wrong with the force of a five-week old, unrefrigerated dead fish." *Fisher v. Roe*, 263 F.3d 906, 912 (9th Cir. 2001), quoting *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228, 233 (7th Cir. 1988).

the AEDPA and the relevant standards of review, but over that of other circuits. This is not the appropriate case in which to question the rulings of federal courts of appeal other than the Ninth.

Petitioner cries for the federal courts to 'acknowledge' and 'effectuate' the heightened factual deference owed under the AEDPA. The Ninth Circuit in this case has done just that. Rather than apply an arguably lower standard such as setting aside state court factual findings if they are not "fairly supported by the record," the court of appeals here expressly acknowledged the deference owed state court factual findings.[13] "AEDPA requires us to presume that the referee's factual findings are correct." *Appendix* C at 20. The court of appeals then held that such factual findings could be rebutted only with "clear and convincing" evidence – the express language of § 2254(e)(1).[14]

The Petitioner legally misstates the record in asserting, "the Ninth Circuit employed a 'firm conviction' standard of review – a standard not found in the AEDPA but described as involving a determination that the state court was 'wrong' and Avila 'correct' – to reject the state court's factual and credibility determinations in favor of conclusions reached as the result of its independent review of the same state court record." (*Petition* at 7.) In conducting its analysis of Respondent Avila's claims under 28 U.S.C. § 2254(d)(1) and (d)(2), the court of appeals was explicitly mindful of the fact that under 28 U.S.C. §2254(e)(1) "a determination of a factual issue made by a state court

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[13] The deference accorded state court factual findings in this case can be contrasted with that afforded in another case decided under the pre-AEDPA standard. "We must defer to the state court's credibility finding unless the finding is not fairly supported by the record considered as a whole." *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997).

[14] It is worth noting that not only did the Ninth Circuit here accord due deference to that state court's findings of fact, it also understood that judicial scrutiny of trial counsel's performance under *Strickland v. Washington* must be "highly deferential." *Appendix* C at 15, citing *Strickland*, 466 U.S. at 689.

shall be presumed correct" and that the Petitioner (Avila) had the burden of rebutting this presumption of correctness with "clear and convincing evidence." *Appendix* C at 20. Not only did the court understand and apply the presumption of correctness and the "clear and convincing" evidence standard required to rebut that presumption, the court of appeals specifically cited to the standard *five times* in its opinion. (See *Appendix* C, at 16; 20; 21, n. 12; 22, n. 13; 23, n. 14.)

Petitioner cites examples of the Ninth Circuit's so-called "impermissible expansion" of its power to grant habeas relief. *Petition* at 7. The examples all relate to testimony presented at the state evidentiary hearing as to the identity of the actual shooter. Not only did four eyewitnesses see Ernesto Avila (not Jesus) fire the shots at Demetrius Kidd on August 19, 1990, Ernesto himself testified to this fact at the state evidentiary hearing in 1993.

With respect to the testimony of the eyewitnesses to the shooting, the Ninth Circuit specifically held that it found clear and convincing evidence in the record to demonstrate that Terri Clark was close to the fight, not further away in the barbecue area as the state court referee had noted in his report. The court of appeals concluded, "There is no basis in the record to conclude that Clark, standing 'close' to the fight, could not have identified Ernesto as the person running after and shooting at the black men." *Appendix* at 21-22, n. 13.[15]

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[15] Contrary to Petitioner's assertion, the state court referee did not find Terri Clark's testimony as lacking credibility based on her longstanding relationship with Jesus Avila. *Petition* at 7. What the referee said in his report was "Terri Clark, who grew up with Petitioner, testified that she saw Ernesto do the shooting." *Appendix* J at 126. At no point in his report did the referee use this relationship as justification for finding that Ms. Clark's testimony lacked credibility. It seems that the referee mentioned the connection between Respondent and Ms. Clark merely as a way of identifying one of the witnesses

The Ninth Circuit also rejected the referee's credibility findings with respect to the other three eyewitnesses because the record contained "clear and convincing evidence" that Alice Dominguez was credible and that photographs in evidence established that she could see the area where the victim fell from where she was located. The court of appeals further noted that Ms. Dominguez told her friend Rosa Luis immediately after the shooting that Ernesto was the shooter – a fact to which Ms. Luis testified at the state habeas hearing. *Appendix* at 22, n. 13. The Ninth Circuit also found that there was no basis in the record for the referee to conclude that Marcella Riboni and Angela Espinoza, two other eyewitnesses, lacked credibility because they were "600 feet" from the shooting. *Appendix* J at 126. Diagrams of the park that were in evidence were not drawn to scale and did not reflect the distance between the witnesses and other areas of the park. Further, the Ninth Circuit noted that it was undisputed that the shooter began running after the victims at around home plate, an area which was significantly closer to the barbecue area (where Ms. Riboni and Ms. Espinoza were located) than where the shooting actually occurred. The Ninth Circuit held there was no basis in the record for the referee to conclude that these two witnesses, standing on picnic benches, could not have identified Ernesto as the shooter. *Appendix* C at 22-23, n. 14. Contrary to Petitioner's assertion (*Petition* at 8), the Ninth Circuit did not simply substitute its findings concerning witness credibility for those of the state court referee. The Ninth Circuit examined the record in detail and determined that it contained concrete evidence establishing conclusively that the referee's findings were wrong.

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to the shooting. Further, it logically follows that if Terri Clark grew up with Jesus Avila, she also grew up with his brother Ernesto.

The Ninth Circuit also found "clear and convincing" evidence that trial counsel's lack of investigation, not witnesses' lack of cooperation, kept the evidence that Ernesto was the shooter out of the courtroom at Respondent's trial. *Appendix* at 16-17. The Ninth Circuit rejected the referee's finding that Ernesto was unavailable to testify at trial for several reasons. First, trial counsel never told his investigator that he believed Ernesto was the shooter and never instructed the investigator to seek out evidence implicating Ernesto. Trial counsel never even attempted to contact Ernesto to see if he would testify. *Appendix* C at 16-17. Second, Ernesto confessed shortly after the crime to Attorney George Denny and Mr. Denny's investigator, David Lynn. Third, when asked to do so by Respondent's appellate counsel, Ernesto testified at the state evidentiary hearing in 1993 that he was the shooter (long before any applicable statute of limitations had run and with no promise of immunity). Based on all of this evidence, the Ninth Circuit reasonably concluded, "There is every reason to believe that, had Yamamoto conducted an adequate investigation and confronted Ernesto with declarations from witnesses to the shooting, Ernesto would have, at the very least, made an inculpatory statement that Yamamoto could have used to cross-examine Ernesto at trial." *Appendix* C at 17 and 24. The findings of the state court referee to the contrary were patently unreasonable and were rebutted with clear and convincing evidence.

Further, Petitioner limits its discussion concerning the Ninth Circuit's finding of ineffective assistance to the eyewitnesses to the shooting and to the shooter Ernesto's testimony. A review of the opinion reveals that a trial investigation never really occurred. Trial counsel did virtually no investigation before trial, and relied on the testimony of a few weak alibi witnesses, rather than even attempting to pursue the

identity of the actual shooter. It is clear from the record of the state evidentiary hearing that the witnesses all existed and were available to testify at the time of trial, had trial counsel chosen to do even a cursory investigation. In addition to the testimony of Ernesto (the shooter) and the eyewitnesses to the shooting, Ernesto confessed to an attorney, George Denny, shortly after the shooting. Several other witnesses all testified that they were near Respondent at the time of the shooting and that Respondent was *not* the shooter. *Appendix* C at 15-25. "There is every indication that all eight of these witnesses would have testified at Jesus's trial . . . . . Their prior conduct reflects both a willingness to come forward and the consistency of their testimony." *Appendix* C at 23-24.

In asserting that the Ninth Circuit simply re-interpreted and re-evaluated "ambiguous or conflicting" evidence in arriving at the conclusion that trial counsel was incompetent and Respondent was prejudiced thereby, Petitioner makes no attempt to identify the so-called "ambiguous or conflicting" evidence. *Petition* at 9. Further, the Ninth Circuit did not merely assert that clear and convincing evidence existed to rebut the referee's credibility and factual findings. Rather, the court of appeals set forth the state court's findings and outlined the "clear and convincing" evidence in the record that rebutted those findings. *Appendix* C at 16; 20; 21, n. 12; 22, n. 13; 23, n. 14. In reviewing the record on appeal, the Ninth Circuit held, "We do not denigrate the role of the fact-finder in judging credibility when we review the record in hindsight. But as we set forth herein, our review of the record leaves us with a definite and firm conviction that error cognizable under *Strickland's* prejudice prong in fact occurred." *Appendix* C at 21.

C. The Ninth Circuit's holding is consistent with the holding in *Early v. Packer* because the state court's reasoning and result contradicted the governing law as set forth in *Strickland v. Washington*.

In *Early v. Packer* this Court clarified the proper analysis of a habeas petitioner's claims under the "contrary to" prong of 28 U.S.C. §2254(d)(1). *Early v. Packer*, 537 U.S. __, 123 S.Ct. 362, 365. In that case, this Court rejected the standard articulated by the Ninth Circuit in *Packer v. Hill*, 277 F.3d 1092 (9th Cir. 2002), that a state court decision is "contrary to " Supreme Court law merely because it fails to cite applicable Supreme Court precedent. In *Early v. Packer*, this Court found, in part, that although the state court had not cited or relied upon the relevant Supreme Court precedent, neither the court's reasoning nor its result were contrary to that precedent. 123 S.Ct. at 364-365. Thus, it held that the habeas petition should not have been granted.

This Court's clarification of the "contrary to" language in *Early v. Packer* does not dictate a result different from the one reached here. In Jesus Avila's case, the Ninth Circuit did note the state court's failure to cite any law, "much less controlling Supreme Court precedent," and its failure to apply either prong of the *Strickland* two-part test for evaluating ineffective assistance of counsel claims. However, the court of appeals further found that the state court's reasoning and its result contradicted governing Supreme Court law as set forth in *Strickland v. Washington*.[17]

In analyzing Respondent Avila's claims of ineffective assistance, the court of appeals explained that it could grant Jesus Avila's petition for writ of habeas corpus "*if* we find that Yamamoto's performance violated *Strickland*." *Appendix* C at 14-15,

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[17] Contrary to Petitioner's assertion, the Ninth Circuit did not find that the state court's findings were "automatically" contrary to federal law based on its failure to cite or apply federal law. (*Petition* at 5.)

emphasis added. As noted by this Court in *Early v. Packer*, this case properly falls under the "contrary to" provision of §2254(d)(1) because either the state court decision applied a rule that contradicted the governing law as set forth in Supreme Court cases or confronted a set of facts that were materially indistinguishable from a relevant Supreme Court precedent and yet it arrived at a result different from that precedent. *Early v. Packer*, 123 S.Ct. at 365 (2002), citing *Williams v. Taylor*, 529 U.S. at 405-406. Although the state court referee failed to mention *Strickland* specifically in his report, he did conclude that, "Trial counsel Ted Yamamoto provided effective and competent assistance at the time of petitioner's trial." *Appendix* at 130.

The Ninth Circuit here analyzed Respondent's ineffective assistance claims under both prongs of the *Strickland* test. In so doing, the court of appeals found that trial counsel's performance was deficient because he failed to investigate or introduce evidence at trial that Jesus's brother, Ernesto, was the actual shooter. In particular the Ninth Circuit noted that an attorney who fails to investigate and introduce evidence that establishes his client's "factual innocence," renders deficient performance. *Appendix* at 15-16, citing *Hart v. Gomez*, 174 F.3d 1067, 1070 (9th Cir. 1999), other citations omitted. In its detailed discussion of trial counsel's deficient performance, the Ninth Circuit held there was "clear and convincing evidence" that it was trial counsel's inadequate investigation, rather than witnesses' lack of cooperation (as the state court referee had found) that kept the exculpatory evidence from the jury. *Appendix* C at 16.

Because the California state courts never analyzed whether there was a "reasonable probability" that, but for trial counsel's error, the jury would have had a reasonable doubt as to Respondent's guilt, the Ninth Circuit conducted an independent

review of the record as to the second prong of the *Strickland* test. *Appendix* C at 20. After its review of the record, the Ninth Circuit held that it was left with a "definite and firm conviction" that error under *Strickland's* prejudice prong had occurred. *Appendix* C at 21-26. In so doing, the Ninth Circuit found that Respondent Avila had rebutted the state referee's findings of fact with "clear and convincing evidence." *Appendix* C at 21, n. 12; 22, n.13; 23, n. 14.

The court of appeals here did not hold that the state court referee's report was contrary to federal law simply because it did not cite or apply any law, much less federal law. *Petition* at 13. While the court of appeals did note this shortcoming on the part of the last reasoned state court decision, it conducted its own review of Respondent Avila's claims under the two-part *Strickland* test. It further used the referee's failure to address the second prong of the test as the basis for its independent review of the record as to the prejudice aspect of Respondent's claim. Had the Ninth Circuit *not* found that trial counsel's performance fell below an objective standard of reasonableness and that Respondent Avila was prejudiced thereby, the petition would *not* have been granted.

In *Packer*, the Ninth Circuit held that because the state court "*failed to apply* the controlling Federal law, . . . the result it reached need not be clearly erroneous in order for a writ to issue; the fact that the result is erroneous is sufficient so long as the *Brecht* standard is met." *Packer v. Hill*, 291 F.3d 569, 579, n. 12 (9th Cir. 2002). The Supreme Court held that the Ninth Circuit *Packer* court erred in then proceeding to a "simple error" inquiry rather than complying strictly with § 2254(d)(1) or § 2254(d)(2) which provide for habeas relief only if state court determinations are not merely erroneous, but are an "*unreasonable* application" of clearly established federal law or based on an

"*unreasonable* determination of the facts." *Early v. Packer*, 123 S.Ct. at 366, emphasis in original.

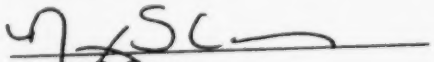
The Ninth Circuit in this case did not apply a simple error inquiry. Rather, it conducted an analysis of prejudice under *Strickland v. Washington*. *Appendix* C at 15, n. 7, citing *Jackson v. Calderon*, 211 F.3d 1148, 1154, n. 2 (9th Cir. 2000), cert. denied, 531 U.S. 1072 (2001). Under *Strickland*, a finding of ineffective assistance cannot be made unless the court also determines that a petitioner was prejudiced as a result of counsel's deficient performance. In other words, there must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 366 U.S. at 694. The Ninth Circuit in Respondent's case, "having considered the totality of the evidence introduced at trial and at the state habeas hearing" held that it was left with a "*definite and firm conviction* that error cognizable under *Strickland's* prejudice prong in fact occurred." *Appendix* C at 21 and 26, emphasis added. The "definite and firm conviction" language is taken from the "clear error" cases wherein simple error alone will not suffice to warrant habeas relief. See *Van Tran v. Lindsey*, 212 F.3d at 1157; *Delgado v. Lewis*, 223 F.3d at 981 and Section A, *supra*. Throughout its analysis of Respondent's claims of ineffective assistance, the court of appeals was clear that simple error would not suffice to grant Respondent habeas relief. Rather, it deferred to all state court factual findings and held Respondent to the burden of overcoming those findings with "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

CONCLUSION

The court of appeals' opinion in this case creates no conflict among the circuits. Further, the holding does not conflict with the holding of this Court in *Early v. Packer* because the court of appeals in this case found the state court findings to be both "contrary to" federal law and an "unreasonable determination of the facts in light of the evidence." Further, Respondent Avila's case does not suffer from the flaws found by this Court in *Early v. Packer*. The state court's findings were both "contrary to" controlling Supreme Court law and an "unreasonable determination of the facts in light of the evidence" under §§ 2254 (d)(1) and (d)(2). If this Court should find error with respect to the court of appeals' holdings under one provision of the AEDPA, this should not affect the outcome as the Ninth Circuit found alternative grounds for relief here. The petition for writ of certiorari should be denied.

February 10, 2003

Respectfully submitted,



Nancy S. Cpan
Paulette Donsavage
Counsel for Respondent
Jesus Avila

DECLARATION OF SERVICE BY MAIL
IN THE SUPREME COURT OF THE UNITED STATES

Case Name: George Galaza, Warden, et al. v. Jesus Avila
Case No.: 02-855

I, Nancy S. Coan, declare:

I am over 18 years of age, and not a party to the within cause. My business and mailing address is 111 Pine Street, Suite 1300, San Francisco, CA. On February 10, 2003, I served a copy of the attached:

RESPONDENT'S BRIEF IN OPPOSITION AND MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

on the following, by facsimile first class U.S. Mail as follows:

Shawn McGahey Webb
Deputy Attorney General
300 S. Spring Street, Suite 5212
Los Angeles, CA 90013

I hereby certify that I am the Attorney of Record for Petitioner, Jesus Avila, in this matter.

Each envelope was sealed on February 10, 2003 and placed in the United States mail at Alameda, CA, the county in which my home office is located, with the postage thereon fully prepaid.

X I declare that the above referenced document was provided to the CLERK OF COURT by Federal Express.
X I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 10, 2003 at Alameda, California.

Nancy S. Coan, Declarant

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No. 02-855

Supreme Court, U.S.
FILED
MAR 18 2003
CLERK

DISTRIBUTED
MAR 17 2003

IN THE

SUPREME COURT OF THE UNITED STATES

GEORGE M. GALAZA, Warden, et al., *Petitioners*

v.

JESUS AVILA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S SUPPLEMENT BRIEF RE MOOTNESS

(U.S. Supreme Court Rule 15.8)

Nancy S. Coan, #124882
Paulette Donsavage, #158681
c/o Kaufman & Logan, LLP
111 Pine Street, Suite 1300
San Francisco, CA 94111
(415) 392-6677
(415) 391-4639 (fax)

Counsel for Respondents

On February 21, 2003, Respondent entered a plea agreement whereby he pled guilty to one count of attempted murder in the second degree. The agreement provided that Respondent would receive credit for the nine years he had already served for the attempted murder and that he would receive credit for the additional time he had served (approximately 3 ½ years) which would be applied to the parole period. Since Respondent had already served a total of 12 ½ years at the time the agreement was made, he was released.

In its reversal of the federal district court's denial of Respondent's habeas petition, the Ninth Circuit ordered that Respondent be granted a new trial. The intervening plea agreement negated the need for a new trial. It is Respondent's position that this plea agreement makes the current case before this Court moot. Therefore, Respondent respectfully requests that the petition for writ of certiorari be dismissed.

Respondent further requests that this Court deny Petitioner's request for the equitable remedy of vacatur. This opinion of the Ninth Circuit's should not be vacated. The Ninth Circuit's opinion highlights the egregious misconduct of a trial attorney whose dereliction of duty amounted to incompetence under *Strickland v. Washington*, 466 U.S 668 (1984). Trial counsel's conduct should be held up as an example to all counsel representing individuals in criminal matters where one's liberty interests may be severely impacted, as were Respondent's here.

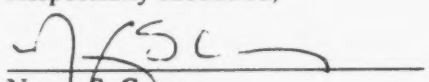
CONCLUSION

For all the reasons set forth above, Respondent respectfully requests that the Court dismiss or deny the petition for writ of certiorari, as there is no need for this Court to address the

merits of this case. Respondent further requests that this Court deny Petitioner's request to vacate the decision of the Ninth Circuit Court of Appeal.

March 13, 2003

Respectfully submitted,



Nancy S. Coan
Paulette Donsavage
Counsel for Respondent
Jesus Avila

DECLARATION OF SERVICE BY MAIL
IN THE SUPREME COURT OF THE UNITED STATES

Case Name: George Galaza, Warden, et al. v. Jesus Avila
Case No.: 02-855

I, Nancy S. Coan, declare:

I am over 18 years of age, and not a party to the within cause. My business and mailing address is 111 Pine Street, Suite 1300, San Francisco, CA. On March 13, 2003, I served a copy of the attached:

RESPONDENT'S SUPPLEMENTAL BRIEF RE MOOTNESS
(U.S. Supreme Court Rule 15.8)

on the following, by facsimile first class U.S. Mail as follows:

Shawn McGahey Webb
Deputy Attorney General
300 S Spring Street, Suite 5212
Los Angeles, CA 90013

I hereby certify that I am the Attorney of Record for Petitioner, Jesus Avila, in this matter.

Each envelope was sealed on March 13, 2003 and placed in the United States mail at Alameda, CA, the county in which my home office is located, with the postage thereon fully prepaid.

X I declare that the above referenced document was provided to the CLERK OF COURT by Federal Express.
X I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 13, 2003 at Alameda, California.

Nancy S. Coan, Declarant